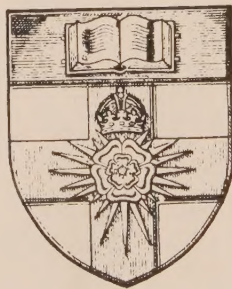


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IN

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THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1920.

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Lord Chancellor.

THE RIGHT HON. SIR JAMES HENRY MUSSEN CAMPBELL,
BART.

Lords Justices of Appeal.

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THE RIGHT HON. JAMES O'CONNOR.

Chancery Division.

THE RIGHT HON. CHARLES A. O'CONNOR M.R.

THE RIGHT HON. JOHN BLAKE POWELL.

Land Judge.

THE RIGHT HON. SIR JOHN ROSS, BART.

Irish Land Commission: Judicial Commissioners.

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Attorney-General.

THE RIGHT HON. DENIS STANISLAUS HENRY K.C.

Solicitor-General.

DANIEL MARTIN WILSON K.C.

[These Reports will be cited as follows :—[1920] 1 I. R.]

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C. LEHANE, . . . }

Master of the Rolls, . . . ROBERT RICE, . . . Barrister-at-Law.

Mr. Justice Barton, . . { D. M. STEEN, . . . } Barristers-at-Law.
M. G. ELLISON, . . . }

Land Judge
and
Land Commission, } T. C. TOBIAS, . . . Barrister-at-Law.

MEMORANDA.

On 11th November, 1920, the RIGHT HON. JAMES OWENS WYLIE having resigned, WILLIAM EWART WYLIE K.C. was appointed a Judge of the High Court of Justice in Ireland, and a Judicial Commissioner of the Irish Land Commission.

M'Donnell v. Stenson. The Court of Appeal have affirmed the decision of POWELL J., reported, p. 85.

M' Dermott's Estate. The Court of Appeal have reversed the decision of SIR J. ROSS J., reported, p. 257.

Dunlop v. Dunlop Rubber Co., Ltd. The Court of Appeal and the House of Lords have affirmed the decision of POWELL J., reported, p. 280.

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C A S E S

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1920.

COUNTESS OF MOUNTCASHELL'S ESTATE.

*Land
Commission.
(Ross J.)
1919.*

Oct. 31.
Nov. 27.

Estoppel—Title—Bona fide mistaken statement—Finding of chief clerk as to ownership of lands—Mistake subsequently discovered—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.

An erroneous statement in an affidavit, made bona fide but without full knowledge of the facts, does not operate as an estoppel against the party making it.

In an action to administer the real and personal estate of a deceased, a finding of fact in the chief clerk's certificate as to the ownership of lands is not conclusive; it is only conditional on title being shown to the lands, and is not in itself a good root of title.

C., tenant for life of the lands of T., married M., and died leaving M. her surviving. M. subsequently married F., the vendor, remained in possession and receipt of the rents and profits of the lands until his death, and on his death left all his property to the vendor, and appointed her sole executrix. Subject to C.'s life estate, the lands in fact belonged to R. in fee. He died in 1888, leaving all his property to his widow, H. In 1898, H., as creditor of M., brought an action for the administration of M.'s estate against F. In an affidavit filed in the action, F. stated erroneously but bona fide that M. was in his lifetime seised of the lands of T., and she also accounted in

*Land
Commission.
(Ross J.)
1919.*

MOUNT-
CASHELL'S
ESTATE.

the action for £35, rent received by her thereout. On the said affidavit the chief clerk found that M. was seised of the lands, and by an order made on further consideration, M.'s real estate was ordered to be sold if the personalty should prove insufficient to pay his debts. The personalty was insufficient, but the lands of T. were not sold, as in fact M. had no title to them. No further steps were taken in the administration action, and the vendor remained in possession and receipt of the rents and profits.

The lands having been sold by her to the tenants under the Land Purchase Acts, *held*, that the vendor was not estopped by the administration proceedings in 1898, that she had acquired as against H. a title to the lands under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57, s. 1), and that consequently she was entitled to the residue of the purchase-money.

QUESTION arising on final schedule.

Under the will of Richard Smyth, who died in 1858, estates, including the lands of Treanlois (otherwise Treanlewis), part of which had been sold in this matter, were settled upon the testator's daughter, Charlotte Mary More Smyth, for life, with remainder to her issue in tail male. Prior to the testator's death, the said Charlotte Mary More Smyth married the Hon. Charles William More, who assumed the name of Smyth. There was issue of the marriage, of whom Richard Charles More Smyth was the first son who attained twenty-one years of age. In 1880 the said Richard Charles More Smyth barred the entail, and assured the said settled hereditaments, subject to the uses and limitations antecedent to the estate tail, to the use of himself absolutely. The said Richard Charles More Smyth died on 3rd of January, 1888, having previously made his will in 1886, whereby he gave all his property real and personal to his wife, Helen Sterling More Smyth, to whom as executrix probate of the said will was granted on 3rd of June, 1888. Charles William More Smyth became Earl of Mountcashell in 1889, and in January, 1892, the said Charlotte Mary, then Countess of Mountcashell, died, leaving her husband, the said Earl of Mountcashell, her surviving. On 17th October, 1893, the said earl was married to the vendor, Florence Countess of Mountcashell. By his will, dated 31st December, 1897, the said Earl of Mountcashell gave all his estate real and personal to the vendor, and appointed her sole executrix. The said Charles William Earl of Mountcashell died on 20th February, 1898, and his will was proved by the vendor.

The said Earl of Mountcashell managed the estate prior to the death of his first wife, Charlotte Mary, and remained in receipt of the rents and profits down to the time of his own death. Since his death the present vendor remained in possession of the lands, which have now been sold, and claims the residue of the purchase-money under the statute of limitations.

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In the year 1898 an action was brought in the Court of the Master of the Rolls, in which the said Helen More Smyth was plaintiff, and the vendor was defendant, claiming as a judgment creditor the administration of the real and personal estate of the said Earl of Mountcashell. The chief clerk's certificate was made up on 24th March, 1900, and it was thereby certified that the said Earl of Mountcashell was seised of the said lands of Treanlois at the time of his death, and that the evidence on which this finding was made was an affidavit made by the vendor in 1898. It was further certified that the testator was indebted to the plaintiff in the sum of £2680. The Master of the Rolls, on 30th April, 1900, made an order on further consideration, directing the real estate to be sold in the event of the personalty proving insufficient to pay the debts, legacies, and costs. The personalty proved insufficient, but the estate was not sold, for the reasons stated in the affidavit of G. M. Knox Peebles, filed in support of the claim. At the time the affidavit was made the vendor had no knowledge of the title, and the statement was made in error. But the mistake was not discovered till after the order on further consideration had been made, and the certificate was not varied.

The lands in question having been sold to the tenants under the Land Purchase Acts, the question now arose on the hearing of the final schedule whether Florence Countess of Mountcashell had acquired a statutory title to the lands and was therefore entitled to the residue, or whether the same should be applied in part satisfaction of Mrs. Helen Smyth's judgment debt.

Walker K.C. (with him *Longfield*), for the vendor:—

The vendor and her husband have been in undisputed possession and in receipt of the rents and profits of these lands since the death of Charlotte Mary Countess of Mountcashell in January, 1892. The title of Mrs. Helen S. More Smyth is consequently

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barred by sect. 1 of the Real Property Limitation Act, 1874. It lies on her to prove some acknowledgment or payment to prevent the bar of the statute. The proceedings in the administration action cannot be relied on as an estoppel for this purpose, because the ownership of the lands was never formally in issue in that action, and the chief clerk's certificate and the order for sale on further consideration were made before the title was properly investigated and in consequence of the assumption (now shown to be erroneous) in the defendant's affidavit that the Earl of Mountcashell was entitled to the lands at his death. *Concha v. Concha* (1) is a clear authority for the proposition that matters incidentally decided in a proceeding cannot operate as an estoppel of record. The right of the creditors to have the realty administered is purely statutory, and can be asserted only against lands of which Lord Mountcashell was seised at the date of his death.

Pigot K.C., for Mrs. Helen S. More Smyth :—

Mrs. Helen S. More Smyth does not base her claim on a title derived under her husband's will. She claims the balance of the purchase-moneys by virtue of estoppel created against Florence Countess of Mountcashell arising from the order on further consideration in the administration action, the chief clerk's certificate confirmed thereby, and the finding in the latter that the lands of Treanlois were held by the late earl in fee-simple. That finding was based on information supplied by the affidavit of the vendor. That order on further consideration directed a sale of the lands, which sale was never carried out for reasons stated in the affidavit filed in support of the present claim. Time cannot run under the statute to defeat creditors' rights declared in a creditor's administration action while something remains to be done in the suit: *Dunne v. Doyle* (2). The purchase-money representing the lands is still bound by the order. Both parties to the former suit, viz., the respective claimants to the residue in this matter, are equally bound by estoppel to admit that the lands were available, if capable of being identified, to satisfy the debts of the late earl. It is only in this sale that the identity of the lands has been discovered. Mrs. Helen S. More Smyth's judgment debt, which

(1) 11 A. C. 541.

(2) 10 Ir. Ch

was directed to be paid in priority to other debts, is still unsatisfied in an amount larger than the available residue. No question of laches has been or could be argued against Mrs. Smyth on the facts disclosed.

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Longfield, in reply :—

The case of *Danne v. Doyle* (1) is distinguishable. The effect of the proceedings in that case was only to keep alive the debt as against any property available in those proceedings for its discharge, and it is not an authority for the proposition that the lands in this case could not be acquired under a statutory title.

Cur. adv. vult.

Ross J. :—

[His Lordship having stated the facts, proceeded as follows]:—

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There are now two persons claiming the residue, namely, the vendor, Florence Countess of Mountcashell, and Helen Sterling More Smyth. It is plain that the latter can take nothing under the will of Richard Charles More Smyth, as the claim of his devisee was barred twelve years after the death of his mother, Lady Mountcashell, in January, 1892. No claim on that ground is made by Helen Sterling More Smyth. But it is contended on her behalf that the administration suit is still in existence, and that, inasmuch as the lands sold in this matter were on the vendor's own evidence found to be the property of Lord Mountcashell and liable to be sold to pay his debts, the vendor is estopped from denying this now, and therefore cannot claim the property as her own. For the vendor it is contended, on the other hand, that as the lands never were in fact the property of Lord Mountcashell, nothing that was done in a suit to administer his assets can affect the lands now. For Mrs. Helen More Smyth it is contended that the vendor, being estopped, the residue should be ordered to be transferred to the credit of the action in the Rolls Court.

Part of the doctrine of estoppel is that the judgment of a Court of competent jurisdiction concludes the matter as between the parties and those claiming under them. It has also been in some cases held that whenever an allegation of fact is made on

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the record and issue taken upon it, and that issue has been found one way or other and followed by judgment, neither of the parties can afterwards reopen that question of fact. This proposition is by no means so well established. It would appear that if the fact is incidental or collateral, there is no estoppel. Further, it would appear from the case of *Concha v. Concha* (1) that the finding of fact must be necessary to the decree based thereon. A native of Chili made his will in London and died. The executor propounded his will, alleging his domicile to be English. His daughter disputed the will, alleging that his domicile was Chilian, and that the will was not executed according to the law of Chili. The Probate Judge pronounced the will valid, and found that at the date of his will and at his death the testator was a domiciled Englishman. It appears from the proceedings in the Divisional Court, *De Mora v. Concha* (2), that the testator had personal estate in England, and that it is the law of Chili that the will of a domiciled Chilian dying in England would be valid in Chili if executed in conformity with English law. Therefore, for the purposes of the probate suit, the finding as to domicile was unnecessary, and the question of domicile was allowed to be raised again in a Chancery suit.

Now what was decided in the administration suit between the same parties on the hearing before the decree? It was proved that there was a debt due by the testator to the plaintiff. Even this was only prima facie evidence of the debt, because it must be vouched in Chambers. It was also proved that the defendant was his executrix and devisee, and bound to pay his debts out of personal and real assets in the hands of the defendant, if any. By the chief clerk's certificate it was ascertained that the debt was due; and on the admission of the defendant, made in ignorance of the facts, the lands in question were found to be the testator's property. But the judgment on further consideration presupposes a regular inquiry into title. If the lands had been sent as usual to the Land Judge's Court for sale, no title could have been made by that Court.

There may be, no doubt, a title acquired by estoppel in certain circumstances, but the circumstances do not exist here.

(1) 11 A. C. 541.

(2) L. R. 29 Ch. D. 268.

The plaintiff was not wilfully misled, nor was she put in any worse position by reason of the erroneous admission. A party should not, in the absence of these circumstances, be held bound by an admission made without a full knowledge of the facts. A waiver is not acted upon unless it is made with full knowledge. The administration suit is a representative action. The decree when made enures for the benefit of all the creditors as well as the plaintiff. The other creditors have no right, by estoppel or otherwise, to have these lands sold for their benefit. Even if there were an estoppel as between the plaintiff in the suit and the vendor, it is difficult to see how the matter could be worked out.

But I am of opinion that there is no estoppel; that the chief clerk's certificate finding the lands to be the property of Lord Mountcashell was only conditional on title being made, and cannot be taken as a good root of title.

I am, therefore, of opinion that the owner is entitled to the residue.

Solicitors for the vendor: *Cathcart & Hemphill.*

Solicitors for Mrs. H. More Smyth: *Peebles & Knox.*

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T. C. T.

IN RE CREAGH, DECEASED.
BURTON v. TURNER.

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July 21.
Nov. 12.

*Will—Construction—Tenant for life—"Die unmarried or without issue"—
"Executors and administrators."*

A testator directed the annual interest on a sum of £1500 to be paid to his sister C. for life, and after her death to be paid to C.'s daughters A. and A. J. until marriage, and, "in case both the said nieces should die unmarried or be married without issue," the testator directed the £1500 to be paid to such of C.'s children as C. should appoint, and in default of appointment to the executors and administrators of C.

Held, applying *O'Mahoney v. Burdett* (L. R. 7 H. L. 388), that by the words "die unmarried without issue," the testator meant the dying of his nieces without issue living at the time of death, at whatever time that death should happen.

Held, further, applying *Attorney-General v. Malkin* (2 Ph. 64), that "executors and administrators of C." meant C.'s personal representatives and not C.'s next-of-kin.

ORIGINATING SUMMONS brought for the determination of questions arising on the construction of the will of Cornelius Creagh, deceased.

By his will dated 17th May, 1879, the testator, having recited that under the trusts of the settlement dated 11th October, 1864, executed on the marriage of his father and mother, certain lands in the County Clare were settled upon trust to raise a sum of £8000 for younger children as his father, Cornelius Creagh the elder, should appoint, and that by deed dated 11th January, 1873, Cornelius Creagh the elder appointed a sum of £1500, portion of the £8000 charge, to his son (the testator) as one of such younger children, directed the annual interest of said sum of £1500 to be paid to his sister, Christina Turner, wife of Dr. James E. Turner, during her life, and after her decease to James E. Turner during his life, and after his decease testator directed the said annual interest of said sum of £1500 to be paid and applied towards the maintenance and education of Christina Turner's two

daughters, Agnes and Anne Julia Turner, in equal shares, until they or either of them be married, when the testator directed said sum to be divided between them in equal shares, £750 to be paid to each of them respectively on her or their marriage, or to be settled on them respectively for their sole and separate use as therein mentioned, and in case any or either of the testator's said nieces should die unmarried, or, if married, without issue who should attain twenty-one years of age or be married, then the testator directed the entire sum of £1500 to be paid to the survivor of the said nieces or the issue of such survivor, or to be secured in such manner as his trustees should think fit, and in case both the said nieces should die unmarried or be married without issue, the testator directed the said sum of £1500 to be paid to such of the children of Christina Turner as she might by deed or will appoint, and, in default of appointment by her, then as her husband James E. Turner might appoint, and, in default of any such appointment, then to the executors and administrators of the said Christina Turner.

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The testator died on the 20th October, 1879. James E. Turner, the husband of Christina Turner, died on the 29th March, 1891, in the lifetime of his wife, without ever having made any appointment under the said will. Christina Turner was married three times, first to John Galway, by whom she had one child only, a daughter Mary Louisa, who married Michael M'Namara, and subsequently died leaving her husband her surviving and several children, one of them being the defendant Maude M'Namara. Christina Turner secondly married James E. Turner, by whom she had two children, the said Agnes and Anne Julia Turner; and, thirdly, married Patrick O'Rourke, and died intestate on the 10th February, 1896, without having exercised the power of appointment given to her by the will of Cornelius Creagh, deceased.

Both the said Agnes and Anne Julia Turner attained their respective ages of twenty-one years in the lifetime of their mother, but neither of them was married. Anne Julia Turner died on the 18th February, 1919, a spinster, leaving her sister, the said Agnes Turner, one of the defendants, her surviving. Patrick O'Rourke obtained a grant of administration to his said wife

Powell J. Christina O'Rourke on the 28th April, 1896, and subsequently died intestate. Letters of administration (intestate) to Patrick O'Rourke were, on the 26th May, 1919, granted to the defendant, Patrick Hugh O'Rourke.

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The defendant Agnes Turner claimed that, in the events which had happened, she was now entitled under the will to receive from the trustees the trust funds. The defendant Patrick Hugh O'Rourke, as personal representative of Patrick O'Rourke, claimed that, subject to the life estate of Agnes Turner, he and the other next-of-kin of Patrick O'Rourke were entitled to the trust funds.

Morgan Byrne, for the trustees of the will.

S. L. Brown K.C., for Agnes Turner :—

The gift over in the event of testator's nieces Agnes and Anne Julia Turner dying unmarried refers to the death of both unmarried in the lifetime of Christina, the tenant for life; my client, therefore, takes by survivorship under the will. I rely upon the fourth rule in *Edwards v. Edwards* (1). *O'Mahoney v. Burdett* (2) and *Ingram v. Soutten* (3) are stated to have overruled the fourth rule in *Edwards v. Edwards* (1); but those cases are distinguishable from the present case, as on the words of the present will I am entitled to rely upon the rule in *Edwards v. Edwards* (1). In the present will it is apparent that there was an intention that when either of these ladies married there was to be a division of the £1500; that the trustees could then divide and pay the £1500 respectively to these ladies. The provision that, in the event of one of them dying unmarried the remaining £750 was to go to the survivor, referred to the death unmarried of the other in the lifetime of the father or mother. The gift over was to be in the event of their death unmarried and without issue in the lifetime of the father or mother. The fourth rule in *Edwards v. Edwards* (1) was restored, and the House of Lords cases distinguished in *Besant v. Cox* (4), *Clark v. Henry* (5), and *Olivant v. Wright* (6).

(1) 15 Beav. 357.

(2) L. R. 7 H. L. 388.

(3) L. R. 7 H. L. 408.

(4) 6 Ch. D. 604.

(5) L. R. 11 Eq. 222.

(6) 1 Ch. D. 346.

J. H. Pigot K.C., for Maude M'Namara :—

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There are no words in the will limiting the happening of the event to the death unmarried in the lifetime of the father or mother. The words in the will providing for payment to the survivor, "or the issue of such survivor or be secured in such manner as his trustees should think fit as therein mentioned," show that the trustees could compel these ladies to execute settlements on their marriages, and that the testator contemplated such settlements; that what he wished to do, and what he accomplished by the will, was that the issue of the ladies were to take an interest in his will. This is inconsistent with an absolute gift to either. In the gift over to the executors or administrators of Christina Turner, the words "executors or administrators" must be read as equivalent to next-of-kin.

Murnan, for Patrick Hugh O'Rourke :—

There is no intention to be found in the will that either Agnes or Anne Julia should have an absolute estate; there is a contingent absolute estate in Christina if she did not appoint. My client, as legal personal representative of Patrick O'Rourke, who was the legal personal representative of his wife Christina O'Rourke, will on the death of Agnes be entitled to the fund as a reversionary chose in action: *Long v. Watkinson* (1); *Drew v. Long* (2); *Betts v. Kimpton* (3).

Nov. 12

POWELL J. (having stated the facts and referred to the arguments proceeded):—

The portion of the judgment of the Master of the Rolls in *Edwards v. Edwards* (4) relied upon by Mr. Brown is to be found at page 364 of the Report. The learned Judge, having previously said, at page 361, that there were four classes of cases in which questions of this description arise, said that it would be necessary for him shortly to refer to each in order to make his decision clear and intelligible. He says, at page 364:—"The case before me comes within the last class of case, namely, where a life estate is

(1) 17 Beav. 471.

(2) 22 L. J. Ch. 717.

(3) 2 B. & Ad. 273.

(4) 15 Beav. 357.

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given to one in the subject of the gift, and on the determination of that estate the subject of it is given to A, with a direction that if he shall die leaving no child his share shall go to the survivor. In this class of cases it is obvious that the event of death without leaving a child may be applied either to the period of distribution or to any point of time either before or after that period, whenever it may occur. Nor, if it were *res integra*, would it be easy, in the absence of any indication of intention to be collected from the rest of the will, to determine which of these constructions ought to prevail. I consider it, however, settled, both on principle and authority, that in the absence of any words indicating a contrary intention, the rule is that these words, indicating death without leaving a child as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution. The principle which regulates such cases is to be found in the often expressed desire of the Court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee or devisee, a principle which seems to have materially influenced Lord Brougham in his decision of *Home v. Pillans* (1).

In the view which I take of the meaning of the present will and the intention of the testator, I would find it very difficult to say that this would be an authority in favour of Mr. Brown's contention, because I think there are words in the present will which do indicate a contrary intention. I shall deal with this later on. But in the case of *O'Mahoney v. Burdett* (2) the foregoing rule, laid down by Sir John Romilly, was examined and overruled. The Lord Chancellor, Lord Cairns, in his judgment, at p. 393, says: "It is said that there is now established an absolute rule of law or rule of construction that where there is a gift for life followed by a gift over of the capital, with a proviso that if the second taker shall die under age or unmarried or without children, there the death of the second taker thus described is to be taken to refer, not to death under those circumstances at any time, but to death under those circumstances before the tenant for life;

(1) 2 M. & K. 15.

(2) L. R. 7 H. L. 388.

and the case of *Edwards v. Edwards* (1), decided by the late Master of the Rolls, is referred to as an authority for this proposition." The Lord Chancellor then (p. 395) says:—"The fourth class of cases mentioned by the Master of the Rolls consists of those where a life estate is given, and the property is then given to A with a direction that if he shall die leaving no child, or unmarried, or under twenty-one, over. As to these cases, the Master of the Rolls observes that the words referring to death without a child, etc., may be applied to death at any time whenever it may occur . . . The Master of the Rolls, however, proceeds to say that he considers it settled, both on principle and authority, that in the absence of any words indicating a contrary intention, the rule is that the words indicating death without leaving a child must be construed to refer to the occurring of that event before the period of distribution, which he takes as synonymous with the death of the tenant for life. The principle to which the Master of the Rolls refers he states to be the desire of the Court to avoid a construction so inconvenient as one which must suspend the absolute vesting of the gift during the whole lifetime of the legatee, the principle which, he says, influenced Lord Brougham in his decision of the case of *Home v. Pillans* (2). With regard to the case of *Home v. Pillans* (2), it will be found, when examined, to have no application whatever to bequests of the kind which we are now considering, and I am not aware of any principle such as the Master of the Rolls refers to being applied to control the natural meaning of the terms of the bequest. . . . I am unable to find in the authorities referred to by the Master of the Rolls the general rule of construction which he deduces from them. . . . I am unable to find in any case prior to *Edwards v. Edwards* (1) any authority that the words introducing a gift over in the case of the death, unmarried or without children, of a previous taker do not indicate according to their natural and proper meaning death unmarried, or without children, occurring at any time, or that this ordinary and literal meaning is to be departed from otherwise than in consequence of a context which renders a different meaning necessary and proper." Lord Hatherley, in his judgment, says: "I apprehend that the rule referred to by the

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(1) 15 Beav. 317.

(2) 2 M. & K. 15.

Powell J. Master of the Rolls may be more correctly stated in somewhat
 1919. the reverse way to that in which it was stated by him in the
 BURTON case of *Edwards v. Edwards* (1), namely, that the period to
 v. which the executory devise will be referred will be the
 TURNER. period of the death of the first taker, unless there are other
 circumstances and directions in the will which are inconsistent
 with that supposition. The Master of the Rolls has rather put it
 in the other way, that an executory devise is to take effect upon
 a person dying without children during the period of the first
 antecedent estate, unless there are circumstances to be found in
 the will to the contrary. I apprehend that the reverse mode of
 putting it will be the more correct mode of expressing the true
 state of the case. In the particular case before me I find nothing
 to favour a contrary construction to that of extending the period
 of the contingent character of the estate to the whole period of
 the life of the original legatee." Lord Selborne says that he
 thinks it is the true result of the authorities before *Edwards v.*
Edwards (1), that words limiting by an unnecessary implication
 the duration of the contingency on which the divesting clause
 depends ought not to be added to the will.

In *Ingram v. Soutten* (2) the head note is as follows:—"A
 will contained bequests to daughters, failing whom and their issue
 living at their deaths, to sons; failing whom and their issue living
 at their deaths, to 'Mary Heathcote, her executors, &c.; and in
 case Mary Heathcote shall depart this life without leaving any
 issue of her body living at the time of her decease,' over. Held,
 that the natural meaning of these words was the dying of Mary
 Heathcote without issue living at the time of her death at what-
 ever time that death might happen; on that event happening the
 fund went over, and there was no technical rule of construction
 which prevented the words from being applied according to this,
 their natural meaning. The rule of construction known as the
 fourth rule, stated in *Edwards v. Edwards* (1), overruled." In re-
 versing the decision of the Lords Justices, Lord Cairns said that
 the construction adopted by the Lords Justices requires us to read
 in, as the Lord Justice James admits, the words "before the
 period of distribution" wherever the word "death" occurs. The

(2) 15 Beav. 37.

(1) L. R. 7 H. L. 408.

Lord Justice James (he says) proceeds upon the authority of the case of *Edwards v. Edwards* (1), and he states that the rules laid down in that case are simple, intelligible, and very beneficial in the administration of testators' estates. The Lord Justice appears to treat these rules as absolute rules of construction to be applied, unless there is something repugnant to them in the particular will; and he adds: "I carefully abstain from referring to any expression in the will which seems to support this view, lest it should be argued hereafter that our decision went on the particular words of the will. I go on this ground that the rule applies, unless there are words in the will to prevent its application, and that in this will there are not any words to take the case out of the general rule. In the case of *O'Mahoney v. Burdett* (2), just now disposed of by your Lordships, I have stated at length the reasons why, if what is termed the fourth rule in *Edwards v. Edwards* (1) was meant to be laid down as a rule of construction without regard to expressions in the particular will requiring such a construction, I am unable to accede to a rule the effect of which would be to alter the natural meaning of words, and I do not repeat the observations upon the authorities which I then laid before your Lordships. I can find nothing whatever in the context, or in the general scope of the provisions of this will, which leads me to think that the words pointing to the death of Mary Soutten without issue living at the time of her death are to be construed as pointing to her death otherwise than as at whatever time it may occur." In this judgment Lord Hatherley, Lord O'Hagan, and Lord Selborne agreed.

I now turn to the will in the present case. Are there any words introducing the gift over in the case of the death unmarried, or, if married, without issue who should attain twenty-one years of age, or be married, which do not indicate, according to their natural and proper meaning, death, unmarried, or without children, occurring at any time, or any context which renders a different meaning necessary or proper? The mother of these ladies, Christina Turner, and her husband, Dr. James Turner, are each to have a life interest, and after the decease of the last life tenant the interest is to be paid and applied towards the maintenance

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(1) 15 Beav. 357.

(2) L. R. 7 H. L. 388.

Powell J. and education of Agnes and Anne Julia Turner in equal
 1919. shares until they or either of them be married, when the sum of
 BURTON £1500 is to be divided in equal shares, to be paid to each of them
 v. respectively on her or their marriage, or to be settled on them
 TURNER. respectively for their sole and separate use as therein mentioned.
 The period of distribution is the marriage of either, and marriage
 is an essential term so far as distribution is concerned.

I think it is quite obvious that the testator intended that there should be a settlement on the respective marriages of these two ladies, if such took place, and that the trustees should carry out this intention. Then, if one of them died unmarried, or, if married, without issue who should attain twenty-one years of age, or be married, the testator directed that the entire sum of £1500 should be paid to the survivor, or the issue of such survivor, or secured in such manner as the trustees should think fit as therein mentioned; again contemplating that the survivor, in the event of the other dying unmarried, or, if married, without issue, who should attain twenty-one years of age, or be married, having acquired the whole sum of £1500, should secure this sum of £1500 by a settlement in such manner as the trustees should think fit as therein mentioned. Then, in the event, which is the event which is contemplated, of both dying unmarried, or, being married, without issue, who should attain twenty-one years of age, or be married, the gift over takes effect.

I am not able to find in the context here anything which renders necessary a different meaning from the ordinary and literal meaning, namely, the death, occurring at any time, unmarried, or, if married, without issue, who should attain twenty-one years of age, or be married.

Mr. Brown also relied upon the cases of *Olivant v. Wright* (1) and of *Besant v. Cox* (2). In both of these cases the Court distinguished the provisions in the wills in question, and the provisions in the wills in *O'Mahoney v. Burdett* (3) and *Ingram v. Soutten* (4). In *Olivant v. Wright* (1) a testatrix devised and bequeathed her separate estate to her husband for life, and after his death to be divided amongst her five children, and if any of

(1) 1 Ch. D. 346.

(3) L. R. 7 H. L. 388.

(2) 6 Ch. D. 604.

(4) L. R. 7 H. L. 408.

her children should die without issue then that child's share to be divided amongst the children then living; but if any child should die leaving issue, that issue should take his parent's share. The five children of the testatrix all survived the tenant for life, and it was held by the Court of Appeal, reversing the decision of Bacon V.-C., that the estate was, at the death of the tenant for life, to be divided between the five children absolutely. Lord Justice James said that the Vice-Chancellor had laid down accurately the rule that where there is a gift over in the event of death without issue, that direction must be held to mean death without issue at any time unless a contrary intention appears in the will, and that the introduction of a previous life estate does not alter that principle of construction. He said that that rule was so laid down by the House of Lords in dealing with the cases of *O'Mahoney v. Burdett* (1) and *Ingram v. Soutten* (2), where the Lord Justice and himself had thought that they ought to follow as a general rule the fourth canon of construction in the case of *Edwards v. Edwards* (3), and had laid down that the introduction of a previous life estate altered the onus probandi, and raised a presumption that the death referred to was to be construed as death in the lifetime of the tenant for life unless a contrary intention appeared in the will, but that the House of Lords appeared to be of opinion that the rule was in *Edwards v. Edwards* (1) laid down in terms too general, and that a gift over in the event of death without issue was to be construed in the same way whether there was a tenancy for life or not. He said that in every case these rules must be governed by the qualification "unless a contrary intention appears in the will," and he held that a contrary intention did appear in express words in the will before him. He said that the whole scheme of the will before him seemed to be as plain and reasonable as any scheme of a will could be; that there was to be a division at the death of the tenant for life, and every event which could occur at the death of the tenant for life had been provided for; that all was consistent with the intention that there was then to be a final division, and that it was the duty of a Court of construction to give effect to

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(1) L. R. 7 H. L. 388.

(3) L. R. 7 H. L. 408.

(2) 15 Beav. 357.

Powell J. that which appeared to the Court to be the plain intent of the
1919. words used.

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I can find no scheme in this will that there was to be a division at the death of the tenant for life. The division here is when either Agnes or Anne Julia Turner married, when £750 was to be paid to each of them on her marriage, or to be settled on them respectively for their sole and separate use as therein mentioned; and the further provision that in case either of them died unmarried, or, if married, without issue who should attain twenty-one years of age or be married, then the entire sum was to be paid to the survivor, or the issue of the survivor, or secured in such manner as the trustees should think fit. I do not think this amounts to a direction that there was to be a division at the death of the tenant for life.

In *Besant v. Cox* (1) a testatrix devised lands to her daughter S. for life, with remainder to the husband of S. for life, and after the death of the survivor of them, to all the children of S. by her then husband who should be living at the testatrix's death as tenant in common in fee, and added a proviso giving over the shares of any of the children of S. who should "depart this life without leaving lawful issue" to the survivor or survivors of the children that should leave such lawful issue as tenants in common in fee. It was held that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution—namely, the death of the surviving tenant for life. Vice-Chancellor Malins, in giving judgment, discussed the cases of *O'Mahoney v. Burdett* (2), and said that every will must be construed according to the intention of the testator, and that he was satisfied on the language of the will, as the Lords Justices were in *Olivant v. Wright* (3), that the intention of the testatrix was, not to tie up the devise during the whole of their lives, rendering the property inalienable and comparatively useless as long as they lived, but only to tie it up until the time the division took place—namely, the expiration of the life estate; and he concurred in the decision in *Olivant v. Wright* (3). He said he was of opinion that the intention was to vest this property and make it alienable at the earliest possible moment, and that he

(1) 6 Ch. D. 604.

(2) L. R. 7 H. L. 388.

(3) 1 Ch. D. 346.

was of opinion that the property vested in such of the children as survived their parent, whether they had or had not issue. Powell J.
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It is not necessary for me to say more than that the ratio decidendi, for the reasons I have already stated, do not appear to me to govern the provisions of the will which I have to construe. I am, however, unable to accede to the contention put forward by Mr. Pigot, that I should read the words "executors or administrators" as equivalent to next-of-kin. In *Attorney-General v. Malkin* (1) Thomas Brand by his will bequeathed the sum of £12,000 to trustees in trust for his wife for her life, and after her death to Addison Carr and his wife, who was the testator's daughter, for their joint lives and the life of the survivor, and after the death of the survivor for such person or persons as Mrs. Carr should by will appoint, and, in default of appointment, to and for the benefit of her executors or administrators. Mrs. Carr died without making any appointment, leaving her husband surviving. He died in August, 1838, without having taken out administration to his wife's estate. By his will he gave all his property to the defendant, Mrs. Malkin, his only daughter, and appointed her and her husband his executors, who accordingly proved his will. On the death of Mrs. Brand, the testator's widow and first tenant for life of the fund, in 1841, Mrs. Malkin took out administration to her mother's estate and claimed the legacy, whereupon the questions arose which an information was filed to determine, namely, what probate and legacy duties were payable, it being contended by Mrs. Malkin that under the limitation to and for the benefit of the executors or administrators of her mother, Mrs. Carr, she, the defendant, was entitled to the fund either as sole next-of-kin of her mother or by personal designation as her administratrix; and, therefore, that only one probate duty and one legacy duty were payable. On the other hand, it was contended on the part of the Crown that under that limitation the reversionary interest in the fund became part of Mrs. Carr's estate on her death, and that Mrs. Malkin's beneficial title to it was derived from the will of her father, and, consequently, that it was liable to two probate and two legacy duties. Lord Chancellor Cottenham in his judgment, having referred to

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(1) 2 Ph. 64.

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several cases, said (at p. 67):—"It appears then that in all the cases in which the next-of-kin have been held entitled the decision proceeded upon a supposed intention derived from peculiar terms and provisions of the instrument controlling the admitted ordinary and legal meaning of the words used. Whether in all these cases there was sufficient evidence of such intention is immaterial for the present purpose, for all the cases assume that without evidence of such intention the next-of-kin would not be entitled. I cannot, however, abstain from observing that such evidence ought to be very strong to justify a construction inconsistent with the ordinary and legal meaning of the words used; that such cases may exist cannot be doubted, for the words being only the media through which the meaning is conveyed, it is immaterial what words are used if we are sufficiently informed of the meaning they are intended to bear; but the actual probability that the author of the instrument intended that the words used should be understood according to their ordinary and legal meaning is so strong that slight circumstances cannot be considered as sufficient evidence of a contrary intention. Too easy a departure from the ordinary meaning leads to uncertainty, and tends to make every case subject to unsatisfactory speculation as to the author's intention. In the present case the testator could have had one of three objects—first, to give it to the executors or administrators of Mrs. Carr for their own use and benefit; or, secondly, in trust for the next-of-kin; or, thirdly, to Mrs. Carr herself, or, rather, to throw it into her estate. The first is the most improbable, the second not much less so; and if that had been his intention, would he have taken this method of effecting his purpose? If, as appears to have been the fact, Mrs. Carr was the object of his bounty, what could be more natural than that, after providing for the life estate and giving to Mrs. Carr all the powers over the fund necessary to secure the enjoyment of property of a married woman, he should give to her all that might not be exhausted by those other provisions? The construction, therefore, which I put upon this instrument preserves the ordinary legal meaning of the words used, is in accordance with the great weight of authority, and is most consistent with the apparent and probable intention of the testator. I am of opinion that the husband became entitled to this reversionary

interest jure mariti, and that the probate and legacy duties are payable upon it as part of his estate.”

I cannot find in the terms of the present will anything to substantiate the supposed intention to control the admitted ordinary and legal meaning of the words used, and therefore the words “executors and administrators” must be given their ordinary and legal meaning. [His Lordship then referred to *Long v. Watkinson* (1), *Trethewy v. Helyar* (2), and *Webb v. Sadler* (3); and continued :—]

Christina Turner died intestate on the 10th February, 1896, without having exercised the power of appointment given to her by the will of Cornelius Creagh, deceased. Her husband obtained a grant of administration to her on the 28th April, 1896, and he subsequently died intestate. Letters of administration intestate to him were granted to the defendant, Hugh O'Rourke, on the 26th May, 1919.

[His Lordship referred to *Drew v. Long* (4), and continued :—] In *Betts v. Kimpton* (5) Lord Tenterden C.J. says :—“ In *Cart v. Rees* (6), cited at the close of the Lord Chancellor's judgment in *Squib v. Wyn* (7), it appears that the wife having died possessed of choses in action, and the husband having also died without taking out administration to her, the wife's next-of-kin administered to her, and in so doing became trustee for the husband's representative. And where it is laid down that the right of administration follows the right to the property, when such right has vested in the husband, that must be understood to mean administration to the wife. In the present case such administration has not been taken out, and the plaintiff, therefore, can have no claim. It stands (he said) on well-known principles that if the husband surviving the wife does not in his lifetime reduce her choses in action into possession, then, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, but the wife's, and they will take the property as trustees for the representatives of the husband.”

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(1) 17 Beav. 471.

(2) 4 Ch. D. 53.

(3) L. R. 8 Ch. App. 419.

(4) 22 L. T. Ch. 717.

(5) 2 B. & Ad. 273.

(6) 1 P. Williams, 381.

(7) 1 P. Williams, 377.

Powell J. 1919. *BURTON* *v.* *TURNER.* Littledale J. said that the choses in action of the deceased wife could only be claimed by a person administering to her effects; and Parke J. said that it was an established rule that choses in action of a wife could only be recovered by the husband after her death as administrator to her, that the cases cited as to the right of the husband and his representatives applied only to the beneficial interest, and, therefore, if the plaintiff could recover these arrears at all, he must do so as administrator to the wife.

It appears to me that although Patrick O'Rourke took out administration to his wife on the 28th April, 1896, her choses in action were not reduced at that time into possession, and the letters of administration intestate to him obtained by Hugh O'Rourke on the 26th May, 1919, will not give sufficient title to Hugh O'Rourke. I think he must take out administration de bonis non to the wife, Christina, in order to be entitled to the sum in question. However, I am not deciding this point at present, nor is it necessary to do so. The question will arise when title has to be made.

Solicitors for the trustees and for Agnes Turner : *Burton & Son.*

Solicitors for Maude M'Namara : *Meldon & Co.*

Solicitor for Patrick Hugh O'Rourke : *C. J. P. Farrell.*

D. M. S.

IN THE MATTER OF THE ESTATE OF THOMAS
TURKETINE (1).

Appeal.

1919.

Nov. 28.

Mortgage—Bankruptcy — Valuation of security—Land purchase — Allocation—Interest—Practice—Rules of the Supreme Court (Ireland), 1899 (Bankruptcy), r. 91—Bankruptcy Act, 1914, 2nd Sched., rr. 10, 14.

D. mortgaged lands in Ireland by separate instruments to W. and B., and subsequently was adjudicated a bankrupt in the English Courts. W. and B. valued their securities in the bankruptcy proceedings at amounts less than the principal sums covenanted to be paid. The trustee in bankruptcy of D. having sold the mortgaged lands as vendor under the Irish Land Purchase Acts, W. and B. were returned on the final schedule of incumbrances as claimants in respect of their mortgages. W. subsequently obtained an order in the bankruptcy proceedings empowering him to withdraw his proof, but no such order was applied for by B. *Held*, by the Court of Appeal (reversing the decision of Ross J.), that W. and B. were not restricted to the amounts of their respective valuations, but were entitled on allocation to payment of the full amount of their claims respectively, with interest at the rate stipulated for in their respective mortgages.

APPEAL.

By an indenture dated the 9th December, 1905, Roger Philip Duke conveyed the lands sold in this matter to the appellant, John Woolfe, by way of mortgage to secure the repayment of a sum of £700, with interest thereon at the rate of 10 per cent. per annum.

By a second indenture, dated the 30th December, 1905, the said Roger Philip Duke conveyed the said lands to the said John Woolfe by way of mortgage to secure the repayment of a further sum of £350, with interest thereon at the rate of 10 per cent. per annum.

By an indenture dated the 13th February, 1906, the said Roger Philip Duke conveyed the said lands to the appellant, Duncan Ramsay Blair, by way of mortgage to secure the repayment of a sum of £675, with interest thereon at the rate of

(1) In the Court of Appeal before SIR J. CAMPBELL C., O'CONNOR M.R.,
and RONAN L.J.

Appeal. 10 per cent. per annum. On the 25th July, 1906, Roger Philip Duke was adjudicated a bankrupt in the High Court of Justice in England, in Bankruptcy, and the above-named Thomas Turketine was appointed trustee of the property of the bankrupt, and subsequently lodged an originating application for the sale of the lands comprised in the above-mentioned mortgages in the Court of the Irish Land Commission.

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The appellants stated in their proofs of debt in the English bankruptcy proceedings the value at which they assessed their respective securities, the value in the case of each mortgage being less than the sum thereby covenanted to be paid.

By an order of Horridge J., dated the 27th October, 1919, made in the said bankruptcy proceedings, the appellant, John Woolfe, was given liberty to withdraw his proof on payment of certain costs to the trustee. No such order was applied for by the appellant, Duncan Ramsay Blair.

The names of the said appellants appeared in the final schedule of incumbrances as incumbrancers on the said lands in the present matter, and on the allocation of the purchase-moneys by Ross J. on the 21st day of July, 1919, the learned Judge declared that the appellants were entitled to be paid the amounts only for which they valued their mortgages in the said bankruptcy proceedings, with interest on such amounts at the rate of 5 per cent. per annum for six years prior to the date of the payment of the purchase-money of the lands into the Bank of Ireland, and the order attaching claims thereto, together with all further interest accrued on such amounts at a like rate since that date. Hence these appeals.

Leonard K.C. and *H. Hamilton*, for the appellant, John Woolfe :—

This appellant is entitled to be paid on allocation of the purchase-moneys the full amounts secured by his mortgages, and interest thereon at the stipulated rate, namely, 10 per cent. Under rule 91 of the Rules of the Supreme Court (Ireland), 1899 (Bankruptcy), a secured creditor having assessed the value of his security is bound to pay over to the assignee, trustee, arranging debtor, or to such other person as the Court shall direct, the

amount which his security shall produce beyond the amount of the assessed value, and his security may be redeemed at the assessed value; and under rule 92 such creditor is unable to increase his proof in the event of his security realizing a less sum than the assessed value. It is otherwise under the Bankruptcy Act, 1914, 2nd Schedule, rules 10 and 14. Under the latter rule the creditor may at any time amend the valuation and proof on satisfying the trustee or the Court that the valuation and proof were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation. Woolfe has taken advantage of this provision. The wide construction placed by the Courts in England on the Bankruptcy Act, 1883, Schedule II, rule 13, corresponding to the present rule 14, is shown by *In re Newton*; *Ex parte National Provincial Bank of England* (1). *In re Burgess* (2), where it was held that in the case of a secured creditor who has put a value on his security, interest runs from the date of assessment at the rate of 5 per cent. only, and *Ross v. Ross* (3), relied on before Ross J., have no application. The learned Judge was not referred to the English practice. As to the amount of arrears recoverable, we admit that under the decision of this Court in *In re Blennerhassett's Estate* (4), our client can only recover six years' arrears accrued due prior to the payment of the purchase-money into the bank. That decision has not, however, met with the acceptance of the profession, and we ask that the question should be reconsidered by the full Court of Appeal.

Hugh Kennedy (*W. E. Wylie K.C.*, with him), for the appellant, Duncan Ramsay Blair:—

My client is in the same position as Woolfe. It is true that he has not actually applied to be released from the English bankruptcy proceedings, but he can so apply at any time, and his present claim cannot be restricted to the amount of the valuation at which he assessed his security: *In re Fox and Jacobs*; *Ex parte Discount Banking Company of England and Wales* (5).

(1) [1896] 2 Q. B. 403.

(2) 23 L. R. Ir. 5.

(3) 25 L. R. Ir. 362.

(4) [1911] 1 I. R. 16.

(5) [1894] 1 Q. B. 438.

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*W. M. Jellett K.C. and Poole, for the respondent:—**In re*
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We admit that Woolfe is now entitled to the benefit of the order he obtained releasing him from the bankruptcy proceedings. Blair is, however, in a different position. He has taken no steps whatever to withdraw or alter his proof, and he is bound by it. The Land Commission proceedings were initiated by the trustee in bankruptcy, himself as vendor, for the purpose of realizing the bankrupt's property; they are in effect a stage of the bankruptcy proceedings; and Blair in claiming as an incumbrancer is claiming in the bankruptcy, and must be bound by his valuation. It does not follow that if he did apply in the bankruptcy proceedings he would obtain relief. He would have to comply with the terms of rule 14: *In re Savin* (1). Under sect. 66, sub-s. 1, of the Bankruptcy Act, 1914, the creditors are restricted to interest not exceeding 5 per cent. per annum. As to the amount of arrears recoverable, *In re Blennerhassett's Estate* (2) is binding on this Court.

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SIR JAMES CAMPBELL C.:—

[His Lordship stated the facts down to the making of the receiving order, and continued]:—

Both these incumbrancers then proceeded to value their securities at sums substantially less than their respective face values. Apparently no interest was paid on either of their securities. The trustee in bankruptcy, wisely I think, considered that the best way of realizing the property would be by a sale in the Court of the Irish Land Commission, and he accordingly filed an originating application on the 4th March, 1908. These proceedings in the Land Commission have now approached their final stage, because the purchase-moneys have been advanced, and the usual order made attaching claims to the purchase-moneys. It has been argued before us that the effect of the valuations placed by these incumbrancers on their securities in the bankruptcy matter entitles the trustee in bankruptcy to adopt these valuations as the measure of the incumbrancers' claims, and,

(1) L. R. 7 Ch. App. 760.

(2) [1911] 1 I. R. 16.

further, that under the English rules regulating the administration of the assets of the bankrupt, the incumbrancers are precluded from claiming interest at a higher rate than 5 per cent. from the date of the adjudication, although payment of interest at the rate of 10 per cent. was provided for by the securities.

Now, it is clear that the object of the English Bankruptcy Rules to which we have been referred is that if, when the property comes to be realized, the amount thereof exceeds the valuation put upon it by an incumbrancer, the latter is entitled to the benefit of the enhanced value, the procedure thus differing from the Irish Bankruptcy Code, under which the creditor is for all purposes bound by the valuation he has adopted, and the benefit of any subsequent excess in value goes to the general creditors of the bankrupt.

These English rules were not brought to the notice of Ross J., and I have no doubt if his attention had been drawn to them that careful and experienced Judge would not have made the order he did in this case. Mr. Jellett has now admitted the claim of Mr. Leonard's client, save as to one matter, which I shall subsequently refer to; but he has relied upon a technical point as against Mr. Wylie's client, his contention being that as the latter has not withdrawn his proof, or obtained the consent of the Court in England to withdraw his valuation, he is not in the same position as Mr. Leonard's client, and must be treated as if the valuation of his security remained unaltered and unaffected. We are satisfied, however, on the plain construction of these English rules that if Baird applied in the English Court of Bankruptcy to-morrow he would obtain *ex debito justitiæ* an order entitling him to withdraw his proof, and we are unable, therefore, to give effect to the technical objection put forward by the respondent.

The further contention of Mr. Jellett, that under the English Bankruptcy Code interest at the rate of 5 per cent. only is recoverable subsequent to the date of the adjudication, must stand or fall with his contention as to the amount of principal money recoverable, because the release from his obligations in the bankruptcy matter, which it is open to the incumbrancer to obtain to-morrow as a matter of course, would also absolve him from this restriction on the amount of interest recoverable.

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There only remains the question agitated in *Blennerhassett's Case* (1), namely, whether the incumbrancers are restricted to the recovery of six years' arrears of interest accrued due prior to the payment of the purchase-moneys of the incumbered lands into the Bank of Ireland. I shall certainly pronounce no opinion of my own on this point in the present case. It may become necessary in some future case to have the question fully reconsidered by the full Court of Appeal. We do not consider that it should be re-opened in this case, and we must treat the decision in *Blennerhassett's Case* (1) as binding upon us.

In the result we must reverse the order of Ross J. in each case, and declare the appellants entitled to payment of the full amount of their incumbrances, together with six years' arrears of interest at the rate of 10 per cent. per annum.

O'CONNOR M.R.:—I agree.

RONAN L.J.:—I agree.

Solicitors for the appellant John Woolfe: *Miley & Miley*.

Solicitors for the appellant Duncan R. Blair: *Horan & Devine*.

Solicitors for Thomas Turketine: *Edwards & Good*.

R. ST. J. C.

HUDDLESTON'S ESTATE.

Limitations, Statute of—Realty—Mortgagee in possession—Sale—Statement in schedule to originating application—Acknowledgment—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 7.

*Land
Commission.
(Ross J.)
1919.
Dec. 12.*

On a sale of land under the Land Purchase Acts by mortgagees in possession (who had been in possession for upwards of twenty-five years), the mortgagor (an undischarged bankrupt) was returned on the schedule to the originating application as owner of the equity of redemption.

Held, that the originating application did not operate in favour of the official assignee, either by way of acknowledgment or estoppel, and that the mortgagees were entitled as absolute owners.

OBJECTION to final schedule.

In 1886 proceedings for the sale of certain lands were taken by the mortgagees on petition in the Land Judge's Court, and an absolute order for sale was made and a receiver appointed. In 1901 the petition was dismissed and the receiver discharged, whereupon the mortgagees entered into possession, and on October 25th, 1907, they lodged their originating application, selling as mortgagees in possession. In the schedule to the originating application the mortgagor (who was made bankrupt in 1892, and had never been discharged) was returned as owner of the equity of redemption. The mortgagees now claimed the residue, and also claimed the bonus on the ground that they had acquired a title under the Statute of Limitations. The official assignee of the mortgagor objected on the ground that the statement in the schedule to the originating application was an acknowledgment of the official assignee's title and right to redemption, and claimed that he should be returned as entitled to the residue, and that the mortgagees should be returned as entitled to such sum as was due on the mortgage; and, further, that if the estate proved solvent, the bonus should be paid to the assignee; if not, that it should be added to the purchase-money.

Hewitt Poole, for the vendors :—

The originating application is not an acknowledgment. Even if it were, it was not made to the mortgagor or those claiming

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under him. A bankrupt is not the agent of the assignee to receive an acknowledgment: *Markwick v. Hardington* (1). In *M'Auliffe's Estate* (2) the originating application was held an acknowledgment, the incumbrancers being parties and privies to the sale; but Wylie J. says:—"I do not intend to express any opinion upon the general question as to whether the mere setting forth, as required by the rules, of a charge in the schedule to an originating application in favour of named persons who had no knowledge of and were not in any way parties or privies to the sale or proceedings, would amount to an acknowledgment to these persons."

Newett, for the official assignee:—

I do not suggest that a bankrupt is the agent of the assignee to make an acknowledgment. I submit that the schedule is a public document published to the world. In construing the statute the Court will adopt a liberal construction: *Blair v. Nugent* (3), per Sugden C., at p. 677.

[Ross J.:—An originating application is on a wholly different footing.]

I submit that the proceedings are analogous to a petition for sale in the Land Judge's Court, and that all persons interested in the redemption are entitled to rely on the schedule. [He also cited *West's Estate* (4) and *Barrett v. Birmingham* (5).] This is a statement made to the Estates Commissioners in the Court of the Land Commission, made on oath, and made for the purpose of obtaining money. I do not suggest that the Estates Commissioners are agents for a mortgagor to receive an acknowledgment, but this is a statement made to all the world. The third schedule contains the names of all persons "interested in the estate," that they may get notice of everything done. What is the meaning of that? Further, I submit that the originating application operates by way of estoppel. The mortgagees cannot now be heard to say that they are owners. [He referred to *The Life Association of Scotland's Estate* (6).]

(1) 15 Ch. D. 339.

(2) 49 I. L. T. R. 202.

(3) 3 J. & La T. 658.

(4) 3 L. R. Ir. 77.

(5) 4 Ir. Eq. R. 537.

(6) [1913] 1 I. R. 91.

Ross J.:—

There is no doubt that a mortgagor is not the agent for the assignees in bankruptcy. This was expressly decided by the English Court of Appeal in *Markwick v. Hardington* (1). But Mr. Newett relies on the originating application itself as being a public document and an acknowledgment to all the world. In schedules in the Land Judge's Court and in bankruptcy acknowledgments can be made; but there is no analogy between a representative action and actions of a purely personal character. In the latter a plaintiff takes proceedings for the satisfaction of his own claim; in the former proceedings are taken for the benefit of all persons interested as well as the moving party. A petition in the Land Judge's Court is a type of representative action. The absolute order for sale when made enures for the benefit of all. Bankruptcy proceedings are of a similar nature: for the benefit of all the creditors. Does the same principle hold good with regard to an originating application? That is an application to the Estates Commissioners to sell land. When the land is turned into money, the money is not paid out to the owner till the charges are ascertained, when they attach to the money and go off the land. These proceedings are wholly different from a representative action. There is no acknowledgment given to the mortgagor within the meaning of sect. 7 of the Act of 1874, and I further hold that no estoppel can arise here by reason of the mere recital of the mortgage. I disallow the objection, and hold that the mortgagees are owners.

Solicitors for the vendors: *F. & C. Downing.*

Solicitors for the official assignee: *Bennett Thompson & McNeill.*

T. C. T.

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HUDDLE-
STON'S
ESTATE.*

(1) 15 Ch. D. 339.

M. R.

1919.

Dec. 2.

IN RE SETTLED LAND ACTS AND OBRÉ.

Settled land—Sale to tenants—Person “deemed to be tenant for life”—Trust for sale—Costs—Land Act, 1903 (3 Edw. 7, c. 37), sect. 48—Land Act, 1904 (4 Edw. 7, c. 34), sect. 3—Settled Land Act, 1882 (45 & 46 Vict. c. 38), sect. 63—Settled Land Act, 1884 (47 & 48 Vict. c. 18), sect. 7.

Where the person deemed to be tenant for life of land devised to trustees upon trust for sale has entered into agreements for the sale of the land under the provisions of the Irish Land Acts, 1903-4, the Court, if satisfied that he is acting honestly and for the advantage of all persons interested, will give him leave to exercise his power of sale under the Settled Land Acts, although the effect will be that he will capture the bonus. The applicant was directed to bear his own costs, and the costs of the trustees were directed to be paid out of the trust fund.

In re Lever's Settlement ([1904] 1 I. R. 492); *In re Settled Land Acts and Tuthill* ([1907] 1 I. R. 305); *Finch v. Jones* ([1912] 1 I. R. 388), followed.

SUMMONS.

By his will, dated the 9th November, 1899, Edward Stanley Obré devised the lands, the subject of the present application, to his executors and trustees upon trust for sale and conversion at their discretion, and to invest the residue of the proceeds of such sale, after payment of his funeral and testamentary expenses, and pay the income thereof to his wife, Georgina Augusta Obré, for her life or during her widowhood, with remainder in trust for the children of the marriage. The testator died on the 1st July, 1907. In 1908 Georgina Augusta Obré entered into agreements with the occupying tenants of the lands for the sale to them of the fee-simple thereof under the Land Acts, 1903 and 1904. The present application was brought under sect. 7 of the Settled Land Act, 1884, by the said Georgina Augusta Obré as “a person deemed to be tenant for life” of the lands under sect. 63 of the Settled Land Act, 1882, for leave to exercise her power of sale.

Leech K.C., for the applicant:—

Although the lands were devised to the trustees upon trust for sale, it has been decided that this is no reason for depriving the tenant for life of his power to sell and so capture the bonus: *In re Lever's Settlement* (1); *In re Settled Land Acts and Tuthill* (2); *Finch v. Jones* (3).

(1) [1904] 1 I. R. 492.

(2) [1907] 1 I. R. 305.

(3) [1912] 1 I. R. 388.

[O'CONNOR M.R. : In those cases the trustees could not sell without the consent of the tenant for life, and the refusal of that consent might have prevented an advantageous sale.]

That is not the ground on which the decisions in those cases were based. The present sale is advantageous to all parties, and there is no reason for depriving the applicant of what the Legislature intended as an inducement to tenants for life to sell.

Meade, for the trustees, stated that in their opinion the carrying out of the present sale would be to the advantage of the estate.

O'CONNOR M.R. :—

I must follow the decided cases. Although in *In re Iever's Settlement* (1) the applicants raised the point that the trustees could not sell without the consent of the tenant for life, Barton J. attached no importance to this, but decided that as the proposed sale would be for the benefit of the estate the tenant for life was entitled to get the bonus. In *Tuthill's Case* (2) my predecessor quoted the following passage from the judgment of Barton J. in *In re Iever's Settlement* (1) :—"It is, in my opinion, no objection to an application of this kind that the applicant, if he is otherwise acting honestly and for the advantage of all persons interested, may be influenced by an inducement which the Legislature has for reasons of public policy held out to him, or that he will gain a benefit which the Legislature has expressed an intention of conferring upon him. In the absence of any other objection to the application, I see no sufficient ground for withholding the leave of the Court." In my opinion the principle there stated exactly covers the present case.

The question of costs is one of some difficulty. The applicant will capture the bonus, and she should therefore bear her own costs; but I think that the only fund for payment of the trustees' costs is the trust fund. I shall therefore order that the applicant shall abide her own costs, and that the costs of the trustees be paid out of the trust fund.

Solicitors for both parties : *Crookshank, Leech, & Davies.*

A. H. W.

(1) [1904] 1 I. R. 492

(2) [1907] 1 I. R. 305.

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ESTATE OF JAMES SAMUEL STANDISH O'GRADY BENNETT (1).

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Land purchase—Devolution—Repurchase of untenanted land by tenant for life—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 3, sub-s. 4.

An owner in fee of an estate entered into agreements for sale to the tenants under the Land Purchase Acts of the tenanted portion, and also applied that the Land Commission might purchase the portion in his own occupation for the purpose of resale to him. Shortly afterwards he died, having, by his will, left the lands in his own occupation to "A" for life, with remainder over to "B." By order of the Land Commission, proceedings in respect of these lands were directed to be continued in the name of the tenant for life; they were repurchased in her name, and vested in her as owner in fee-simple.

Wylie J. having decided that the remainderman was not entitled to an order under sect. 3, sub-s. 4, of the Irish Land Act, 1903 (3 Edw. 7, c. 37), declaring that the tenant for life held the lands in accordance with the terms of the settlement made by the will :

On appeal, the Court being of opinion that Wylie J. had overlooked the underlying principle of the section, and concluding that he had gone wrong in point of law, and had exercised his discretion without due regard to definite and fixed principles :

Held, that an appeal lay, and (reversing Wylie J.) that the remainderman was entitled to the order sought.

APPEAL from an order of Wylie J., dated 15th July, 1919, refusing the application of Thomas Brodie Bennett for an order that part of the lands sold in the matter and repurchased should devolve in accordance with the terms of the settlement made by the will of James Samuel Standish O'Grady Bennett.

James Samuel Standish O'Grady Bennett was owner in fee of certain lands in the county of Limerick, partly tenanted and partly in his own occupation. He entered into agreements for sale to the tenants under the Land Purchase Acts of the tenanted portion, and filed on the 11th September, 1907, an originating application for the purpose of having the sale carried out. He also applied that the Land Commission might purchase the portion in his own occupation for the purpose of resale to him. He died in December, 1908, before the sale was carried through, and before entering into any agreement for sale of the untenanted land, having by his will, made in 1906, devised the lands in his own

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

occupation, with some of the tenanted lands, to his cousin, Jane Bennett, for her life, with remainder to his brother, Thomas Brodie Bennett, and his sons and daughters as therein. Letters of administration, with will annexed, were in 1909 granted to the said Thomas Brodie Bennett, and proceedings were continued as to the tenanted land in his name as personal representative, and as to the other lands in the name of Jane Bennett as tenant for life under the will. The sale of the tenanted land was completed in 1912. After the death of the testator, the said Jane Bennett entered into possession of the untenanted land as tenant for life, and sold it for £2500 to the Estates Commissioners, who resold it to her for the same amount, advancing to her that sum to enable her to purchase.

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WYLIE J. (having stated the facts as above set out, proceeded):—

The said Thomas Brodie Bennett as remainderman now applies for an order under sub-s. 4 of sect. 3 of the Act of 1903 (3 Edw. 7, c. 37) that the repurchased land should devolve in accordance with the terms of the settlement which at the date of the sale affected it. I have had several of these applications before me from time to time, and in most cases the applications have been granted; but in one case at least (*Frost's Estate* (1)) I refused the application on the ground that there was no tenanted land, and that the land repurchased was merely part of a large farm which vendor, as tenant for life, had sold to the Estates Commissioners on the terms of his repurchasing that part at an apportioned part of the purchase-money. It was really a sale under sect. 8, and not under sect. 3. In all cases, however, I dealt with each on its own facts, and avoided expressing any opinion as to the principle underlying sub-s. 4 of sect. 3, or as to the extent of its application. In *Desart's Estate* (2), however, Mr. Justice Ross, in granting an application under this sub-section, proceeded to lay down and discuss the general principle of equity which seemed to him to be the basis of this sub-section, which he considered ought to be applied in deciding applications under it. He applied the same principle in *Ely's Estate* (3) in 1903 with regard to the bonus, and held that the

(1) 42 I. L. T. R. 266. (2) [1909] 1 I. R. 397. (3) [1904] 1 I. R. 66.

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tenant for life took it as a trustee for all parties interested in the settled lands. That, I think, shows the danger of applying or superadding a general principle of equity to the construction of a statute, and particularly to such a statute as the Land Act of 1903. The Act confers many benefits on the tenant for life of a settled estate in the event of his selling it, which are plainly given to him as an inducement to sell, and whatever the statute gives him for his own use he is entitled to keep. Sect. 3, sub-ss. 1 and 2, clearly gives a tenant for life power to sell the settled land, including the demesne and other lands in his occupation, and the right to repurchase such demesne and other lands, and to obtain an advance from the Land Commission for that purpose. Having exercised that statutory right and obtained the fee-simple of the lands pursuant to the Act, it seems to me he is entitled to keep it for his own benefit, except so far as the statute limits that right. No doubt, under sect. 53 of the Settled Land Act of 1882, in exercising a power of sale under that Act he is deemed to be a trustee for all parties interested, and would be bound to sell for full value; but having sold for full value, sect. 53 does not apply to him in exercising the power or right to repurchase conferred upon him by the Act of 1903. In my opinion, therefore, he has not repurchased in any sense as a trustee, and having obtained the fee-simple, discharged of all interests, trusts, and claims, from the Land Commission, in whom by the sale to them it was so vested, he is entitled to keep it for his own benefit, unless a Judicial Commissioner makes an order under sect. 3, sub-s. 4, that the land should devolve upon the trusts of the settlement. That is the only provision affecting his statutory right. The question then is: What is the meaning, purpose, and effect of sub-s. 4? Why was it inserted in sect. 3? According to the judgment of Mr. Justice Ross, as I understand it, it was inserted to enable a Judicial Commissioner, upon an application made within a limited time, to make an order based on the general principle of equity, which he puts thus:—"It is because he is tenant for life that he is enabled to purchase the demesne. . . . On the plainest principles of equity he cannot be permitted to retain for his own use property acquired by reason of his position under the settlement against the will of those claiming in

remainder. . . . The tenant for life, when he is selling his estate, can sell the demesne also, without the leave of anybody, but when, by reason of his tenancy for life, he buys it back, equity will at once lay hold on the repurchased demesne. If sub-sect. 4 were not in the section, I apprehend that there would be no answer to a suit in Chancery brought by those entitled in remainder to have the new estate brought into the settlement."

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Now, if these dicta are correct, they are of universal application, because in every case it is by virtue of his position as tenant for life that he acquires the land; there is no room left, therefore, for the discretion of the Judicial Commissioner in making the order under the sub-section. But the words of the sub-section are, "a Judicial Commissioner may, if he thinks it equitable," make the order, clearly giving a discretion. And if the Legislature intended the sub-section to be applied to all cases, why did it not simply provide that the lands when repurchased should devolve upon the trusts of the settlement? These dicta of the learned Judge were not necessary for the decision in *Desart's Estate* (1), because in that case the lands repurchased were the old mansion-house and demesne that had been in the Desart family from the time of Charles II, and to my mind it was a simple case of making the order upon its special facts. I do not, therefore, feel bound by these dicta; and it seems to me that sub-section 4 was inserted without any intention that the general principles of equity referred to should be superadded. I think it was inserted to control and render equitable the new power of sale conferred upon the tenant for life by sub-sect. 1 of sect. 3. Prior to this Act, a tenant for life could not sell and take out of the settlement the demesne and other lands occupied therewith without the consent of the trustees of the settlement or an order of the Court, and therefore it was only fair, just, and equitable that if such land were sold and repurchased by the tenant for life under this new power, a remainderman should, if he thought fit, be entitled to have the lands bought back into the settlement. This view, I think, is borne out and strengthened by sub-sect. 5, which provides that, in the event of the tenant for life not repurchasing, the trustees of the settlement may obtain an advance

(1) [1909] 1 I. R. 397.

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for repurchase, and in such case the lands repurchased are to be held subject to the trusts of the settlement. If, therefore, the lands sold and repurchased by the tenant for life were such as he could not sell prior to the Act of 1903 without the consent of the trustees or an order of the Court, I think an order under sub-section 4 should be granted as a matter of course; but, though I think this was the primary purpose of sub-sect. 4, the words of the sub-section were made wide enough to cover other cases where the circumstances of the case might raise an equity in favour of the remainderman. It is obvious, for example, that in some cases a tenant for life, where he intended to repurchase land in his occupation, might agree to sell to the Estates Commissioners at an undervalue with a view to minimize the annuity payable in respect of the advance, or to avoid having to lodge cash to make the advance up to the full purchase-money, or where the estate was heavily incumbered and there might be no residue. In such a case, in order to prevent the remainderman from being prejudiced by a sale at an undervalue, it would be just and equitable that an order should be made under sub-sect. 4. On the other hand, if the land repurchased is such that the tenant for life could, prior to the Act of 1903, have sold it and taken it out of the settlement without the consent of anyone, and if the price for which it is sold to the Estates Commissioners is its full value, I do not see how the remainderman is prejudiced by anything done under the Act, and in such a case it would seem to me that there would be no equitable grounds for making an order under sub-sect. 4 unless there were other special circumstances raising an equity. In this case the land repurchased could undoubtedly have been sold by the tenant for life under the Settled Land Acts without the consent of anybody. There is no mansion-house; there is no demesne. It is simply what the owner himself in the originating application calls "the farm and lands in my occupation." It was five miles away from his dwelling-house. He sometimes farmed it himself, and sometimes let it for grazing on the eleven months' system. It does not appear to differ in any respect from the adjoining holding, except that it has no farm-house upon it. If, therefore, the £2500 for which it was sold to the Estates Commissioners was its full value, there could not, in my opinion, be

any equity against the tenant for life in favour of the remainderman. The only thing that suggested a doubt in my mind as to the value was the fact that the Estates Commissioners advanced the full sum, but under the section the Estates Commissioners are to buy at a price which, in their opinion, represents the selling value of the land, and I think I must assume, in the absence of evidence, that the full selling value was obtained. Besides, counsel for the remainderman did not raise any question as to value, or in any way base his motion on that ground. I therefore see no equitable ground for making the order asked for, and must refuse the application.

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Healy K.C. (with him *D. B. Sullivan*), for the respondent:—

We submit, by way of preliminary objection, that no appeal to this Court lies under sect. 3, sub-s. 4, of the Irish Land Act, 1903. The order which the Judicial Commissioner may make being entirely in his discretion, no question of law can arise. It is true that an appeal under the section came to this Court in *K'Eogh's Estate* (1), but in that case Walker C. said they had no right to interfere with the discretion of the Judge below.

In *Attorney-General v. Sillem* (2) Lord Westbury says: "The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be an act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right."

SIR JAMES CAMPBELL C.: We will hear the appeal without prejudice to Mr. Healy's point.

Conner K.C. and *H. Poole*, for the appellant:—

The tenant for life in this case is in no better position than a trustee, and on no principle of equity can she be permitted to enjoy the estate as owner in fee.

Healy K.C.: The lands having been acquired by the Land Commission, they could resell to whom they choose. They resold to Mrs. Bennett, and, if there are any rights in other persons under the will, they must attach to the purchase-money, and not to the lands.

(1) 44 I. L. T. R. 54.

(2) 10 H. L. 704, at p. 720.

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SIR JAMES H. CAMPBELL C. :—

It appears in this case that a gentleman named James Samuel Standish O'Grady Bennett, owner in fee of certain lands, made a will in 1906 by which certain specified denominations were devised by him to Mr. Healy's client as tenant for life, with remainder over after her death to Mr. Conner's client. Some time in 1907 he entered into negotiations with the Land Commission for the purpose of selling to them certain tenanted land, asking them, at the same time, pursuant to the powers of sect. 3 of the Irish Land Act, 1903, to purchase from him portion of his estate, consisting of untenanted land, with the view of reselling it to him after they had so purchased it. He died in the month of December, 1908, while the negotiations with the Land Commission were still pending, and after his death letters of administration with the will annexed were granted to Mr. Conner's client, a gentleman named Thomas Brodie Bennett, the person entitled to the lands upon the determination of the life estate of Mrs. Bennett. We all know that owing to various causes—want of money and the disinclination of the Treasury to exhaust the amount provided—land purchase transactions were hung up, with the result that in this case nothing further of a practical nature was done until 1918. An offer was made by the Land Commission to Thomas Brodie Bennett, as administrator of the deceased testator, to carry out that part of the arrangement suggested in 1907—namely, the purchase of the untenanted land with the view of resale. The difficulty appeared to have arisen that he did not represent the estate, and accordingly the Land Commission made an offer to the tenant for life which she accepted, and thereupon an order was made by the Commission vesting the land so bought and resold in Mr. Healy's client for an estate in fee simple; in other words, they enlarged her life estate into an estate in fee simple. That was done in pursuance of the powers conferred by sect. 3 of the Act of 1903; but there is also a provision in the section enabling any person entitled to any estate in remainder or reversion in the lands to apply to the Court to make the lands subject to the terms of the settlement, whether under will or deed, and the Judicial Commissioner is empowered to order, if he thinks it equitable, that

the lands resold shall devolve in accordance with the terms of the settlement.

A very serious question, but it is not necessary to decide it, arises—namely, whether this lady fulfilled the conditions at all, having regard to the fact that she was not the owner of an estate who had entered into any agreement for the sale of lands to persons other than the Land Commission, because *prima facie* this would appear to be a condition on which all the rest of the procedure of the section is based. The words of sect. 3, sub-s. 1, are: “Where the owner of an estate has entered into agreements under the Land Purchase Acts for the sale to persons other than the Land Commission of the estate,” the Land Commission may purchase adjacent lands in his occupation, and resell them to him. Sub-s. 3 uses the words: “In entering into agreements for the resale of any land to the vendor of an estate,” etc., and sub-s. 4 says: “Where any land is resold in pursuance of this section” the Judicial Commissioner may, if he thinks it equitable, make an order in the terms to which I have already referred. But it is sufficient for the purpose of this case to say that it is abundantly plain—and the whole judgment of Wylie J. proceeds on that basis—that the offer of this lady was made by reason of her being tenant for life under the will of the owner who had made the original proposal, and I cannot conceive any principle of equity or any other consideration which would make it equitable for the Judicial Commissioner to enlarge, as against the remainderman, the estate of that lady into an estate in fee simple.

It is said that the matter was entirely in the discretion of the Judge, and that no appeal, therefore, lies from his decision; but being of opinion, as we all are, that Wylie J. overlooked the underlying principle of this section, we conclude that he has gone wrong in point of law, and that he has exercised his discretion without due regard to definite and fixed principles. He points out that Ross J. had, in dealing with the same section, said that the benefit acquired by the tenant for life would, in any Court of Equity, be construed as a benefit acquired for those entitled to successive estates in the property. Wylie J. says he has acted on that rule in the majority of cases; but he goes on to say, for some reason which I am unable to comprehend, that he deemed it

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equitable to depart from it in the present case. Assuming that the case comes within the section—Mr. Healy's client is estopped from saying it does not—and that Mrs. Bennett was entitled to get the vesting order, she could only get it, if any regard is to be paid to the principles of equity, as tenant for life and trustee for those entitled in remainder. Therefore, I think the judgment of Wylie J. was based on wrong principles, and that he did not properly exercise his discretion. On these grounds, and holding that the question was one of law, we allow the appeal.

RONAN L.J. :—

At first sight it seems a curious transaction that the Land Commission should purchase land for the full value from the owner in fee, and then resell it to him at the same full value, say £2500, the sum in this case. Of course the explanation is that when he sells he gets the £2500, but when he repurchases he obtains an advance of the amount on the same terms as tenants purchasing their holdings. In fact, neither he nor they pay anything, but the land is charged with an annuity calculated at £3 5s. (or £3 10s. under the Act of 1909) per cent. on the amount of the advance. The double transaction really amounts to an advance on mortgage of the land of a sum equal to the full value at about three per cent. interest. As Ross J. puts it in *Desart's Estate* (1):—"He has the benefit of public money on terms just as advantageous as a purchasing tenant." It is obvious that such terms as these are not open to every owner of land in possession. Sect. 3, sub-s. 1, of the Act of 1903, which authorizes this proceeding, carefully limits the application of it to the owner of "an estate who has entered into agreements under the Land Purchase Acts for the sale of the estate to (substantially) tenants"; and sect. 3, sub-s. 2, limits the amount to be advanced to one-third of the aggregate amount of the advances made to tenants. Or again, as Ross J. puts it, "the amount of the advance to him for repurchase depends on the amount of land he has sold to tenants." The proviso to sect. 3, sub-s. 1, enables the Land Commission, "if they think it necessary for furthering the purposes of this Act," to dispense with the condition that the land shall be near the estate. It will be observed that

(1) [1909] 1 I. R. 397.

there is no distinction in the section in its application, 1, to demesne; or 2, to land near the estate; or 3, to land where the Land Commission have dispensed with that condition. In his judgment Wylie J. says that the lands in this case are five miles away from the dwelling-house. This does not show whether they are within sect. 2 or 3. The point is that they are within sect. 3. There is no suggestion that they are within or were purchased under sect. 8. This is important, for the only case to which Wylie J. refers where he refused an application of this nature, *Frost's Estate* (1), was, he says, "really a sale under sect. 8, not under sect. 3." *Frost's Estate* (1) has therefore no application to sect. 3. In cases within sect. 3 the land is plainly not purchased for the purposes of sect. 8. What, then, are "the purposes of this Act" referred to in the proviso to sect. 3, sub-s. 1? Plainly, to induce owners of estates to sell them to tenants; the advance or the power to "resell to him" is, when exercised, the statutory reward to the owner who has done so, i.e., "who has entered into the agreements." Wylie J. says:—"The Act has conferred many benefits on a tenant for life of a settled estate in the event of his selling it, which are plainly given to him as an inducement to sell, and whatever the statute gives him for his own use he is entitled to keep." But to sell what, and to whom? Plainly to sell the estate to the tenants.

He then says:—"Sect. 3, sub-ss. 1 and 2, clearly gives a tenant for life power to sell the settled land, including the demesne and other lands in his occupation, and the right to repurchase such demesne and other lands and to obtain an advance," &c. This is, in my opinion, misleading. Sect. 3 never mentions the tenant for life; it gives him no power. It simply enables the Land Commission to make an advance in certain cases. Further, the person to whom the advance is to be made is described as the "owner of an estate." The primary meaning of this in the Act is owner in fee. Under sect. 17, sub-s. 2, "a limited owner" may be dealt with as "the owner for the purposes aforesaid," which include, no doubt, sect. 3. But can it possibly be suggested that sect. 17 makes a "limited owner," who has not entered into agreements for the sale of the estate, the "owner" of an estate who has entered into such agreements? If not, the tenant for life in this case is not an owner within sect. 3, and

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therefore not a person to whom the statute authorizes an advance under that section. The statute, sect. 3, does not give him anything "for his own use" or otherwise. But, further, "the owner" in sect. 3, sub-s. 1, is not the owner of the land, the subject of the sale and resale; he is the owner of the estate agreed to be sold to the tenants. However, in sect. 3, sub-s. 3, we have the word "vendor," but it is "the vendor of an estate," not of the land, the subject of the sale and resale.

I think it is clear that the only tenant for life who is within either the express words of sect. 3, as extended by sect. 17, or its scope and object, is a tenant for life who has entered into "agreements for the sale of the estate." In my opinion, the whole section only applies to the case of a vendor who, either in virtue of his estate or of a power of sale, whether statutory or not, is able to sell the fee to the tenants. It is an inducement to him to do so, and a reward for having done so.

The other principal inducement and reward in the Act is the bonus under sect. 48. There the words are "may pay to the vendor of each estate." In sect. 3, sub-s. 1, the words are "may resell to him," that is, to the owner who has agreed to sell his estate to the tenants. In sect. 3, sub-s. 3, the transaction is described as "resale of any land to the vendor of an estate," practically identical with sect. 48, so far as these words are concerned.

The vendor may be—1, a person selling his own property, i.e., an owner in fee; 2, a person selling partly his own property and partly the property of other people, i.e., a tenant for life; 3, a person only selling other people's property, i.e., a trustee for sale. Neither sect. 3 nor sect. 48 makes any distinction between these classes of vendors, but it is fairly plain that in class 1 the vendor must take the rewards under both sections for his own benefit, and equally plain that in 3 he cannot take them for his own benefit. But what about class 2? *Desart's Estate* (1) was a case of this class. In my opinion, Ross J. was perfectly right in considering the decisions on the almost identical question arising on the bonus; of course having regard to any differences between sect. 3 and sect. 48. But the decision in the *Ely Case* (2) was put an end to in less than a year, as the amending Act was passed in August,

(1) [1909] 1 I. R. 397.

(2) [1904] 1 I. R. 66.

1904. That Act provided that when the tenant for life vendor is paid the bonus it shall be retained by him for his own benefit. There is no such amendment of sect. 3; but Wylie J.'s proposition, that he may keep "whatever the statute gives him for his own use," brings into sect. 3 the words of the Act which only apply to sect. 48. But it seems to me that the fundamental error is in assuming that this is anything but a case of, 1, a simple sale of the estate by the owner in fee. The sale and resale of land not comprised in the estate sold is simply machinery for giving the reward to the person who has earned it. At the time of his death he was at least as much entitled to it as he was entitled to the bonus. Indeed, I am not sure that he had not a better title, as the bonus is only payable when the estate is sold, while the sale and resale apparently can be made any time after the signing of the agreements for sale. It differs from the bonus in this: that it is attached to the other lands of the vendor, it increases the value of these lands; but the lands with this increased value are the absolute property of the owner in fee. No one else has any claim, legal or equitable, to them.

When the vendor agreed to sell the estate to the tenants, what was the real inducement or consideration to the knowledge of all parties? Not that the tenants would ever pay him the amounts of the purchase-money in each case. It was, 1, what he hoped to get out of the purchase-money from the Land Commission; 2, the bonus; 3, the benefit of sect. 3. If he had lived he would have got all three, and no one else would have had any claim, legal or equitable, to any of them. They were all valuable rights of property. It cannot be suggested that he lost any of them by his death. They formed part of his real and personal estate, and not the less so because they were more or less contingent rights. All three subsequently materialized. 1 and 2 were simply cash, absolutely his property; 3 is more complicated. It required the machinery of the sale and purchase transaction; but what was it in substance? An exchange of his fee-simple in the lands for £2500 plus (the full value of the lands) the lands themselves subject to the purchase annuity, really a free gift of the latter. The right to this exchange was given to him by the statute, and to no one else. Suppose he had left the income of all his

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property, real and personal, to A for life and the corpus to B, with or without trustees, A would be the person to carry out the machinery for effecting the exchange and obtaining the £2500 and the gift of the land, subject to the annuity. But can it be doubted that he would only be entitled to the income of 1, 2, and 3. According to the decision of Wylie J., he would only be entitled to the income of 1 and 2, and of the part of 3 consisting of the £2500; but he would be entitled to the corpus of the land, subject to the annuity. His only claim is under the will; he has no claim under the statute. He has got the legal estate in fee in part of the corpus of the estate. In my opinion sect. 3, sub-s. 5, affords a convenient mode of declaring the rights of the parties. I therefore agree that the order should be made.

O'CONNOR L.J.:—

I think that Wylie J. did not sufficiently bear in mind four facts: 1, that the owner who applied under sub-s. 1 was an owner in fee; 2, that this owner in fee settled the lands by his will; 3, that the person in whom the lands are now vested has one claim, and one claim only, to the lands based on the will; and 4, that the effect of his order is to destroy and defeat the intention of the will. These were the cardinal facts of the case, and as Wylie J. took no adequate notice of them, I am of opinion he has misdirected himself in point of law. If he had taken these facts into his consideration, his decision would have been the other way.

I may add that I am by no means certain that sub-s. 4 of sect. 3 of the Act of 1903 has any application to a case in which the owner, who has made an application under sub-s. 1, is then an owner in fee, and has, by an instrument taking effect after the application, settled the land. Sub-section 4 is an enabling sub-section, and in the case I put, it may be that, apart from the operation of an order under sub-s. 4, a person claiming through such an instrument must be considered, on plain equitable grounds, to hold the lands upon the terms and trusts of the said instrument. This point, however, has not been argued here. I wish to direct attention to it, and to say that I hold myself free as to it in the future.

Solicitors for the appellant: *F. M. Fitt & Co.*

Solicitor for the respondent: *M. Healy.*

IN THE MATTER OF THE TRUSTS OF THE WILL OF JOHN CLOUGH CLARKE, DECEASED; AND IN THE MATTER OF THE TRUSTEE ACT, 1893. WILLIAM ALEXANDER, PLAINTIFF; AND ANNIE CLARKE, WINIFRED ISABEL CLARKE, JOHN ORDOYNO CLARKE, HAROLD SPENCER CLARKE, JAMES CECIL CLARKE, EDGAR CLARKE, STANLEY CLARKE, AND EVA FRANCES ALEXANDER, DEFENDANTS.

M. R.
1919.

Dec. 10.

(1919. No. 975.)

Will—Trust for sale—Unlimited power of leasing—Sale by way of sub-fee-farm grant or lease—Trustee Act, 1893, sect. 13.

A trustee for sale under a will, with an unlimited power of leasing, is entitled to carry out the sale by granting sub-fee-farm grants or sub-leases in consideration of fines and reserving rents exceeding in the aggregate the head-rent.

ORIGINATING SUMMONS by the plaintiff, the surviving trustee of the will of John Clough Clarke, deceased, for the determination of the following question:—

Whether, under the powers conferred upon the plaintiff by the said will and the above-mentioned Act, he is entitled to grant sub-fee-farm grants, or sub-leases, for long terms of years of any portion of the real or chattel real estate, subject to the trusts of the said will, in consideration of fines to be paid by the grantees or lessees, and rents to be reserved which would in the aggregate exceed the head-rent payable under the fee-farm grant or lease by which such portion of the said estate is held by the plaintiff as such trustee.

By his will, dated the 7th July, 1890, after certain directions as to the carrying on and sale of his business and practice as a dentist, the testator devised and bequeathed all his real and personal estate to his trustees, upon trust for sale and to pay the income thereof to his wife during her life or widowhood, and upon further trusts therein declared to postpone such sale for so long as they should think fit; and he further directed that his trustees might let any hereditaments for the time being remaining unsold, either from year to year, or for any term of years, at such rent and subject to such covenants as they should think fit.

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Charles Murphy, for the plaintiff:—

A trustee for sale has no implied power of leasing, but in the present case the trustee has an unlimited power of leasing. I submit that the plaintiff can combine these two powers, and do what is asked for in the summons. His position is analogous to that of an executor, who could undoubtedly do this: Bacon's Abridgment, Leases (I) 7. [He referred to *In re Walker and Oakshott's Contract* (1); *In re Judd and Polands and Skelcher's Contract* (2)].

Wm. Lowry, for the defendants Edgar Clarke and Eva F. Alexander.

O'CONNOR M.R.:—

This summons was taken out for the purpose of determining whether a trustee for sale under a will, with an unlimited power of leasing, of real property held under fee-farm grants, is entitled to carry out the sale by granting to purchasers sub-fee-farm grants or sub-leases for long terms of years, in consideration of fines, reserving rents which would in the aggregate exceed the head-rent payable under the fee-farm grant or lease by which such portion of the estate is held, and thus create a profit-rent, which could also be sold.

The real estate of the testator, John Clough Clarke, consisted largely of house property situate in the city of Belfast, held by him under fee-farm grants and leases for long terms of years. In particular there are ten houses situate in Adeline Terrace, South Parade, Belfast, held under a fee-farm grant at the yearly rent of £43 10s., and let to yearly tenants at rents amounting to £247. It is with these ten houses that we are at present concerned.

By his will, dated the 7th July, 1890, he devised all his real and personal estate to trustees upon trust to sell, call in, and convert into money the same, and declared that they should have power to postpone the sale and conversion of the whole or any part of the estate for so long as they should think fit; and he gave his trustees a further power to let any hereditaments for the time being unsold, either from year to year, or for any term of years, at such rents and subject to such covenants as they should

(1) [1901] 2 Ch. 383.

(2) [1906] 1 Ch. 684.

think fit. In the execution of this trust the trustee proposes to sell the ten houses singly by making, in consideration of fines, fee-farm grants or leases for long terms of years to the several purchasers, reserving profit-rents, which could afterwards be sold separately.

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On the evidence before me I have no doubt that this mode of sale is the most advantageous for the trust estate, but the question is raised whether this mode of sale is authorized by the trust. It has been decided that the ordinary trust for sale does not authorize a mere lease, and so it may be said that the making of a sub-fee-farm grant or lease is in itself not a sale; but the substance of the contemplated transaction must be considered rather than the form.

By sect. 13 of the Trustee Act a trustee for sale "may sell or concur with any other persons in selling any part of the property either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit." In this case the trustee for sale contends that this section gives him powers to carry out the sale in the way proposed, because, although the proposed disposition of the property is in part by way of sub-fee-farm grant or lease, the whole transaction will in substance be a sale, and will result in a complete alienation of the trust estate. As against this view there is the judgment of Kekewich J. in *In re Walker and Oakshott's Contract* (1). There trustees for sale put up for sale by auction in lots leasehold property comprised in a single lease (of which they were assignees), subject to a condition that in the event of the lots being sold to different purchasers (which happened) the sale of each lot should be by way of under-lease for the whole of the term, less one day, at an apportioned rent. Kekewich J. held that this was not a valid exercise of the trust for sale, inasmuch as the transaction would consist of the making of leases, and not be a sale, which was the only thing authorized. The learned Judge based his decision principally upon the fact that the trustees would, notwithstanding the disposal of the property, remain liable for the rent reserved by the lease which was vested in them—an event not contemplated by the creator of the trust. It is not stated in the report of the case

(1) [1901] 2 Ch. 383.

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what the amount of the rent was, and I must assume that it was a substantial liability, and not a merely nominal one. If a substantial liability was to continue in respect of the property notwithstanding its alienation, then I think the objection to the mode of sale would be a real one. But it is remarkable that the 13th section of the Trustee Act was not referred to either in the arguments of counsel or in the judgment. *In re Walker and Oakshott's Contract* (1) came up for review in *In re Judd and Poland and Skelcher's Contract* (2). In that case trustees for sale under a will put up for auction five leasehold houses, held under one lease, in five separate lots, subject to a condition that, if all the lots were sold at the present sale, the purchaser of the largest lot in value should execute an under-lease for the whole of the term, less one day, to the respective purchasers of the other lots at an apportioned rent, but that if any of the lots remained unsold (which happened), the vendors would grant to the purchaser or respective purchasers of the lot or lots sold such an under-lease as aforesaid of each lot sold. As one of the lots remained unsold, the vendors proceeded to execute under-leases to the purchasers of the other lots. An objection was made by the purchasers that the vendors, being trustees for sale, could not make leases. This objection was allowed by Warrington J.; an appeal was taken from him, and the objection was disallowed. As was stated by the Lords Justices, the appeal was really from the judgment of Kekewich J. in *In re Walker and Oakshott's Contract* (1), because Warrington J. held that he was bound by it. In the Court of Appeal special consideration was given to sect. 13 of the Trustee Act. Romer L.J., having quoted it, said: "These are very general words, and I should be loth to cut down their generality so long as trustees, in availing themselves of the provisions of the Act, do not do anything that would be unreasonable in their capacity of trustees for sale." Then, having referred to the fact that the conditions of sale were ordinary and usual conditions of sale, well known to conveyancers for the purpose of carrying out a sale of properties, all comprised under one lease when selling by lots, he said that it appeared to him that it ought not to be said that the trustees were acting improperly or beyond the powers conferred on them

(1) [1901] 2 Ch. 383.

(2) [1906] 1 Ch. 684.

when they used the conditions of sale in question. "It is not," said the Lord Justice, "as if there was any extra liability cast upon the trust estate by their doing so," and later on in his judgment he says: "I may take it that an under-lease in substance is not justified, but when an under-lease is a pure matter of conveyancer's expedient—a method of conveyancing for carrying out a sale—then I cannot see that there is any objection to it." Cozens-Hardy L.J. in his judgment said: "I think it is a fallacy to say, because trustees for sale are not authorized to grant a lease, that they have not power in a case like this to carry out the sale by means of that which is a mere piece of machinery."

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Now, I think that these judgments cover the present case. The object of the trustee is to dispose absolutely of the entire estate of the testator. He does not propose to make sub-fee-farm grants or sub-leases for the purpose of retaining rents for the trust estate. No doubt, he will carve out sub-interests, but so far as the trust estate is concerned, these will have only a momentary existence, because the rents reserved will also be disposed of. Further, there will not be any liability cast on the trust estate.

The evidence goes to show that the proposed mode of sale is that usually adopted in Belfast as the most likely to attract purchasers, and to effect a sale on terms most advantageous to vendors. In the present case a sale in one lot was attempted, with the result that it proved abortive, and the vendor has been advised by experienced auctioneers who practise in Belfast that the most profitable way to sell the houses would be to make one lot of each house by offering to the purchaser of it a sub-fee-farm grant at a small rent in consideration of a fine, the rents reserved to be afterwards sold. I see no reason for rejecting such advice, which is based on the experience of competent auctioneers, who know how property may be most advantageously realized in Belfast. It would indeed be disappointing to the beneficiaries if they learned that their estate must be sacrificed owing to what they would naturally regard as a slavish adherence to technicalities. I see no adequate reason for holding that the proposed mode of sale cannot be carried out.

Solicitor for plaintiff: *T. E. Alexander.*

Solicitor for defendants Edgar Clarke and Eva F. Alexander :

A. W. Glover.

Solicitors for the other defendants: *D. M'Gonigal & Sons.*

Land Com. IN THE MATTER OF THE ESTATE OF EDITH VERE
FitzGerald J. SPROULE AND DOROTHY PATRICIA SPROULE,
 1919.

July 5, 12.

AND IN THE MATTER OF JUDICIAL LEASES IN
 WHICH THE SAID EDITH VERE SPROULE AND
 DOROTHY PATRICIA SPROULE ARE THE INTENDED
 LESSORS.

*Practice—Land Commission—Infant tenant in common—Leases granted at
 fines—Appointment of guardian—Landlord and tenant (Ireland) Act,
 1870 (33 & 34 Vict. c. 46), s. 61; Land Law (Ireland) Act, 1881 (44 &
 45 Vict. c. 49), s. 38.*

E. and her infant daughter D. were owners as tenants in common of certain lands. These lands were put up for sale by auction in eight lots, under conditions providing that the owners should grant the purchasers judicial leases for 300 years at specified rents, the purchasers paying fines to be fixed by competition at the auction. On an application to the Land Commission by the owners to appoint H. G. guardian of the infant:

Held that, under sect. 38 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), incorporating sect. 61 of the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), the Land Commission had jurisdiction to appoint a guardian to carry out the transaction on the infant's behalf; but that, inasmuch as the transaction in substance was the sale of an estate of which the infant was entitled to an undivided half, the proper course was to make the infant a ward of Court, and then to apply to the Lord Chancellor (or other Judge before whom the minor matter should come) to approve or not of the application to the Land Commission to sanction judicial leases; and that, on the infant's being made such ward of Court, the amount of the fines, so far as they belonged to her, should be lodged in Court to the credit of the minor matter to be dealt with by the Judge before whom such minor matter should come; but that the Land Commission had no jurisdiction to order the fines to be lodged in Court or otherwise to deal with them.

MOTION EX PARTE.

The applicants were owners as tenants in common of an estate in the County of Roscommon, containing 433A. 3R. 0P. Part of this estate was held in fee simple, part in fee farm, part under a lease for lives renewable for ever, and the remainder under a lease for 1000 years. All the lands were in hands, and it was considered advisable in the interest of the owners to put up the lands by auction in lots, the purchasers to get judicial leases for 300 years of the lots purchased by them at the rents fixed by the owners for each lot, the purchasers to pay fines to be subject to competition.

The sale was held on 10th October, 1918, and all the lots were sold. There were eight lots in the estate; the rents fixed by the owners amounted to £338 10s., and the fines agreed to be paid by the purchasers amounted to £7230. It was stated in Court that there were mortgages affecting the estate for over £9000, and that it was intended to pay the £7230 pro tanto in discharge of them.

The owners applied to the Land Commission to have Hodson Gunning appointed guardian of the infant to carry out the transaction on the infant's behalf.

Longfield, for the applicant :—

The power of making judicial leases for any term is created by the Land Law (Ireland) Act, 1881, sect. 10, and applies to a holding in which there is no subsisting tenancy. Sect. 23 contemplates such leases being made at fines even by limited owners, but provides that the fines arising from the exercise of the powers shall be dealt with in the manner provided by the Lands Clauses Consolidation Acts as defined in sect. 29 with respect to purchase-money or compensation coming to persons having limited interests. Sect. 38 incorporates with the statute of 1881 the provisions of the Landlord and Tenant (Ireland) Act, 1870, sect. 61, as to persons under disability. It is submitted, therefore, that an infant who is absolutely entitled can lease at a fine, and that this Court has power to appoint a suitable person guardian to do all acts which the applicant, if not under disability, could have done. The cases of *Marsh v. Morland* (1), *Re Mauleverers, Minors* (2), *Carr v. Grey* (3), *M'Kenny v. Bustard* (4) show that a guardian can be appointed by this Court to represent an infant in any proceedings, whether actually pending or intended to be instituted.

FITZ GERALD J. :—

This is an application on the part of Edith Vere Sproule, widow of Thomas Berry Sproule, and Dorothy Patricia Sproule, her daughter, an infant, aged six years, to appoint Hodson Gunning, brother of the said Edith Vere Sproule, guardian of Dorothy Patricia Sproule, to the intent that he might give such

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(1) 15 I. L. T. R. 74.

(2) Ro. & Dill. 19.

(3) 23 I. L. T. R. 89.

(4) 2 N. I. J. R. 246.

Land Com. consents, do such acts, and be party to such proceedings as the
Fitz Gerald J. said Dorothy Patricia Sproule might have done or been party to
 1919. in regard to judicial leases proposed to be granted of the estate in
In re the title mentioned, and the application of fines agreed to be paid
SPROULE'S for the granting thereof.
ESTATE.

[His Lordship, having stated the facts as above set out, proceeded as follows :—]

Two questions appear to arise in the case, independently of the general question, as to sanctioning judicial leases—
 1. Whether, as the transaction is virtually the sale of the infant's estate by means of judicial leases and fines, the infant ought not to be made a ward of Court, in order that the application for sanction may or may not be authorized by the Lord Chancellor or other Judge dealing with the minor matter? 2. Whether the amount of the fines should be lodged in the High Court, or lodged in the Land Commission, and therein distributed. The provisions of the Irish Land Acts affecting the matter appear to be as follows: By sect. 10 of the Land Act of 1881, the landlord and proposed tenant of any holding to which this Act applies, which is not subject to a subsisting tenancy, may agree, the one to grant, and the other to accept, a lease, for a term of thirty-one years or upwards (referred to as a judicial lease), on such conditions, and containing such provisions, as the parties may agree upon, and such lease, if sanctioned by the Court, shall be deemed to be substituted for the former tenancy, if any, in the holding, and the tenancy shall, during the continuance of such lease, not be deemed to be a tenancy to which the Act applies. By sect. 23 of the same Act a landlord, being a limited owner, may exercise any of the powers which he might exercise if he were an absolute owner, with the exception that a limited owner shall not grant a judicial lease without the sanction of the Court. Any fines shall be dealt with in the manner provided by the Lands Clauses Consolidation Acts with respect to the purchase-money coming to parties having limited interests.

The present case is not the case of a limited owner, but of a person under disability, and the importance of sect. 23 is that it recognizes judicial leases being made by limited owners taking fines.

By sect. 29, sub-sects. 2 and 3, of the Act of 1881, the Lands *Land Com.*
 Clauses Consolidation Acts are incorporated in the Act of 1881 *Fitz Gerald J.*
 for certain purposes, but those purposes do not include the matter *1919.*
 at present before the Court; the purpose for which they are *In re*
 incorporated is the purchase by the Land Commission of an *SPROULE'S*
 estate from a person having a limited interest. *ESTATE.*

By sect. 38 of the Act of 1881, sect. 61 of the Land Act of 1870 is incorporated in the Act of 1881 as if the purposes therein referred to included the purposes of the Act of 1881. Amongst the purposes in the said sect. 61 it is provided that where any person, if not under disability, might have made any application, given any consent, done any act, or been party to any proceeding in relation to any holding under the Act of 1870, the guardian of such person may make such applications, give such consents to do such acts, and be party to such proceedings as such person, if free from disability, might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of the Act; and where there is no guardian the Civil Bill Court of the county may appoint a guardian for the purpose of any proceedings under this part of the Act.

It appears to me that the incorporation under the aforesaid sect. 38 is full and unconditional for the purposes of the Act of 1881, and that, as the tribunal selected for determining whether the proposed judicial leases should be sanctioned is the Land Commission, it would have jurisdiction to appoint a guardian in the case of a minor to make the application on the minor's behalf, but it would probably be more convenient if the guardian was appointed in the minor matter hereafter mentioned. At the same time, as the entire transaction is in substance the sale of an estate of which the minor is entitled to an undivided half, I think the correct course to be pursued is to make the infant a ward of Court, and then the Lord Chancellor or other Judge of the Chancery Division before whom the minor matter may come can approve, or not approve, of the application being made to the Land Commission to sanction the judicial leases.

As to the second question, how the fines are to be dealt with—if it was the case of a limited owner, I think there would be no difficulty, as the procedure is provided by the *aforesaid sect. 23.*

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The fines are to be dealt with in the manner provided by the Lands Clauses Consolidation Acts with respect to purchase-money coming to parties having limited interest; that is, by lodging them in the High Court to the credit of the matter. But, as I have already said, this is not the case of a limited owner, but of a person under disability, and no procedure is set out in the Act of 1881.

I do not think it would be correct for me to sanction these judicial leases until the amount of these fines is under the control of the Court. Therefore, as soon as the infant applicant is made a ward of Court, the amount of the fines, so far as they belong to her, should be lodged in Court to the credit of the minor matter and dealt with by the order of the Judge before whom the minor matter comes.

I do not think the Land Commission has any jurisdiction to have these fines lodged in the Land Commission or to deal with them. I understood the mortgagees appeared in Court, and consented to the sanctioning of the judicial leases, but there was no statement in the affidavit upon which the motion was grounded as to the names of the persons having mortgages on the landlord's estate, nor was there any statement that there were no other incumbrances. This may be done in the minor matter; if not, a short affidavit should be filed before the sanction is given. I do not think there is anything further I can suggest at the present stage.

Solicitors for the applicants: *Moore, Keily, & Lloyd.*

T. C. T.

[*Reporter's Note.*—An application was subsequently made to the Lord Chancellor to have the applicant, Dorothy Patricia Sproule, placed under wardship, and the granting of the judicial leases was approved in the minor matter; and, with the consent of Mrs. Edith Vere Sproule, the other owner, leave was given to have the fines brought to the credit of the minor matter to be there dealt with. But in the case of *Estate of Charles Colley Palmer* (M. R., November 18th, 1919), unreported, in which fines, fixed by competition at a sale by auction, were taken on the making of judicial leases by a limited owner, the fines were, with the approbation of the trustees of the settlement, lodged in the Chancery Division to a special credit, suitably intitled, and were, on petition, paid out on foot of a mortgage, which was the first charge on the inheritance. *Ex. rel. M. G. Longfield.*]

MOFFETT v. MOFFETT.

(1911. No. 537.)

*Domicil of origin--Abandonment--Acquired domicil--Onus of proof--
Evidence.*

Powell J.

1919.

Oct. 31.

Nov. 18.

Appeal.

1920.

Feb. 4, 9.

W. M., whose domicil of origin was Irish, and who was an officer in the British Army in the year 1859, was sent with his regiment to Grahamstown, Cape Colony, South Africa. In 1861, while at Grahamstown, he was discharged from the army. In 1864 a son was born to him, the mother of whom he married in 1867, and, if he were domiciled in Cape Colony, he would thereby have legitimated his said son. In 1879, his first wife having died, he married secondly, and in 1887 made a joint will with his second wife in form in use in Cape Colony. He continued to reside from 1859 till his death in 1893 in South Africa. Evidence was given that W. M. had spoken of his desire to return to Ireland, and of doing so when his financial position had improved.

Held, by Powell J. on the facts, that W. M. had abandoned his Irish domicil, and was in 1864 domiciled in South Africa.

The decision of Powell J. affirmed by the Court of Appeal (1).

MEMORANDUM from the Chief Clerk adjourned into Court.

The following statement of facts is taken from the judgment of POWELL J.:—

In the year 1859 William Moffett, senior, became an officer in the British Army, and about that time went with his regiment to be quartered at Grahamstown. In 1861, while at Grahamstown, he was discharged from the army. In 1864 an illegitimate son was born to him—William Armstrong Moffett—of whom the mother was one Elizabeth Anne Hastings Cleary. In 1867 William Moffett, senior, married Elizabeth Anne Hastings Cleary, and thus, according to the law of the country in which he then resided, his son William Armstrong Moffett became legitimate. In 1868 he went to Hopetown, and stayed there until 1878, during which time he was in the employment of a land surveyor. In 1878 he went to Newings Trading Station. He married his second wife on the 21st October, 1879, by whom he had several children. In 1881 he joined a volunteer force for

(1) SIR JAMES CAMPBELL C., RONAN and O'CONNOR L.JJ.

Powell J. the defence of Gatsburgh, then besieged by natives, and received
 1919. a commission as Lieutenant. In August, 1884, he was at Cala,
MOFFETT where he acted as a messenger to the Court of the Resident
v. Magistrate. Thereafter he opened a store at Clutha, in what is
MOFFETT. now known as the Elliott District, where he died on the 16th
 July, 1893.

Thomas Benjamin Moffett, a son of William Moffett, senior, by his second marriage, in an affidavit said that his father always regarded himself as of Irish domicil, and intended if he came into Irish property to return there. He says he had several conversations with him on this subject.

Elizabeth M. Moffett, who was the second wife of William Moffett, senior, made an affidavit in which she said that prior to and during her marriage to William Moffett, senior, he always claimed that he was returning to Ireland to his home, and that she was to go with him; that he sought and obtained the consent and approval of his relatives in Ireland for his marriage to her, and she says that his object in doing this was to smooth over previous troubles into which he had got himself with them, so that they should be welcomed when they arrived home; that her husband could not save or make sufficient money for the expenses of the journey, and she attributes this to the fact that he was trained as a soldier, and was incompetent in trading or commercial concerns; that during the whole of the period of her married life from 1879 to 1893, when he died, her husband always spoke to her of his return to Ireland, and that he also spoke to Thomas Benjamin Moffett, the eldest son of his marriage with her, on the subject of his domicil, which he always claimed was Ireland; that he acquired no immovable property in South Africa or other interest of a permanent nature, and that at no time did he live in Natal, but always resided in the Cape Province, formerly called the Cape of Good Hope.

Peter Morris made an affidavit, in which he stated that he came to Cala, Cape Province, South Africa, in the month of May, 1892, where he has since resided, and that he then became acquainted with the late William Moffett, senior; that in the year 1893, in his hotel in Cala, he heard William Moffett, senior, request one Purcell, a doctor of medicine, to examine him, as he

did not feel well; that Dr. Purcell asked William Moffett, senior, to state the symptoms of which he complained, whereupon William Moffett, senior, said that the doctor should make that out for himself; that Dr. Purcell then remarked that the symptoms should be told to him, as he was not a "vet," and that William Moffett, senior, then said, "My Irish doctors will soon find out what is wrong with me." Deponent says that he understood from this, and other general circumstances, that William Moffett, senior, meant that he had decided soon to return to Ireland.

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William Henry Hammond, in his affidavit, said that he had resided in Cala since 1885, and was well acquainted with William Moffett, senior, whom he knew from the year 1886 and onwards. That in the years 1886 and 1887 William Moffett, senior, also resided in Cala, and he says, "I gathered from conversations with him, and from his conduct generally, that he desired to return to his people in Ireland."

The persons interested in the question raised by the memorandum were the defendant, Thomas Benjamin Moffett, and his brothers, the children of the second marriage of William Moffett, and the defendant, William Eddleston Moffett, the eldest son of William Armstrong Moffett, the son of William Moffett, born prior to his marriage with his first wife, Elizabeth Anne Cleary. The legitimacy of William Armstrong Moffett depended upon whether the domicile of his father was South African or Irish. An affidavit of William R. Bisschop, LL.D., barrister, was filed, who deposed that by the Common Law prevailing in Cape Colony in 1864 and 1867 legitimacy of children born out of wedlock took place by the subsequent marriage of the persons who procreated them.

H. Wilson K.C. and *Oulton K.C.* (with them *Murnaghan*), for Thomas Benjamin Moffett, eldest son of William Moffett, senior, by his second marriage:—

William Moffett, senior, never lost his Irish domicile. Questions of domicile were finally settled and the law fixed in *Winans v. Attorney-General* (1). The onus of proof is on those who contend that the domicile of origin has been lost and a new domicile acquired:

(1) [1904] A. C. 287.

Powell J. Westlake International Law, 4th ed., p. 333. *Moorhouse v. Lord* (1) is no longer law. The intention to abandon a domicile of origin must be clearly shown: *Huntly v. Gaskell* (2). William *MOFFETT v. MOFFETT.* Moffett, senior, was a rolling stone in South Africa. Ireland was the only place where he had expectations. From length of residence alone, unaccompanied by circumstances, including intention, a change of domicile cannot be inferred: *Patience v. Main* (3); *Bell v. Kennedy* (4). Assuming that from length of residence it might be presumed that William Moffett had acquired a South African domicile, there is no presumption or evidence that at either the birth of his son, William Armstrong, in 1864, or his marriage in 1867, he had acquired a South African domicile. It is essential to prove that at both these dates the domicile of William Moffett was South Africa: *Udny v. Udny* (5); *In re Grove Vaucher v. Solicitor to the Treasury* (6). A domicile acquired after these dates would be of no avail. Further, the intention to change one's domicile to be effective must be voluntary and for an indefinite period: *Udny v. Udny* (5); Lord Westbury at p. 456. These elements are not to be found in the present case. When William Moffett was discharged from the army he had no choice but to stay in South Africa, as he was devoid of means, as deposed to by his widow; and his stay in South Africa was to be for a fixed and not for an indefinite period, namely, when his title to the Irish property would fall into possession at his brother's death or would be defeated by his own death. These principles have been frequently reiterated and never questioned.

Maxwell K.C. and *Cecil Fforde*, for the defendant William Eddleston Moffett:—

We admit that the onus lies upon us of satisfying the Court that William Moffett acquired a domicile in Cape Colony. The two elements necessary are residence, coupled with the *animus manendi*. William Moffett resided in Cape Colony from the year 1859 until his death in 1893. Evidence of the intention to remain

(1) 10 H. L. C. 272.

(2) [1906] A. C. 56.

(3) 29 Ch. Div. 976.

(4) L. R. 1 Sc. App. 307, at p. 321.

(5) L. R. 1 Sc. App. 441, 447-8.

(6) 40 Ch. Div. 216, at p. 233.

is seldom expressed, and, when it is, is not of high value. It may be and usually is inferred from the whole facts of the case and from the history, character, and conduct of the man whose domicile is in question: *Attorney-General v. Winans* (1), relied on for the defendant Thomas Moffett, is an authority for this. That case only decided that the onus of proving a change of domicile had not been discharged. It does not purport to alter the law as theretofore understood. We submit that the true inference to draw from the history of William Moffett's life in South Africa is that from the time of his discharge from the army in 1861, when he was free to return to Ireland, he determined to settle in Cape Colony, where he lived for thirty-five years, where he twice married, and where he died. We rely on the making of his will jointly with his second wife, in form in use in South Africa, and by which he excluded his children from rights which they could only have had on the assumption that the testator's domicile was South Africa. Length of residence, where there is nothing to counteract its effect, may be conclusive: *Udny v. Udny* (2); *Monro v. Monro* (3); *Attorney-General v. FitzGerald* (4); *King v. Foxwell* (5); *Doucet v. Geoghegan* (6). Evidence as to what a man's intention was at any particular time may be shown by the course of subsequent events: *In re Grove* (7); *The Harmony* (8); *Loustalan v. Loustalan* (9); *Craignish v. Hewitt* (10). The evidence of what Moffett did is not rebutted by the evidence of what he is alleged to have said, which is vague, unsatisfactory, and dangerous to act upon. Such evidence could not be admitted to outweigh all the acts of the man's life: *Doucet v. Geoghegan* (6), Jessell M.R. A vague notion of some time or other returning to the domicile of origin—a "mental undercurrent," to use the phrase of Porter M.R. in *Davis v. Adair* (11)—is not enough to prevent the acquisition of a domicile of choice. The evidence of Wm. Moffett's expressions with reference to a possible return to Ireland do not go the length of any then present intention. They at most amount to a desire or hope that

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(1) [1904] A. C. 287.

(2) L. R. 1 Sc. App. 441.

(3) 7 Cl. & F. 842, 847.

(4) 3 Drew, 610, at p. 615.

(5) 3 Oh. Div. 518.

(6) 9 Ch. Div. 441, at p. 456.

(7) 40 Ch. D. 216, at pp. 236-242.

(8) 2 Rob. Adm. 322.

(9) [1900] P. 211, at p. 232.

(10) [1892] 3 Ch. 180.

(11) [1895] 1 I. R. 379, at p. 400.

Powell J. he might return when his financial position enabled him to do so.
 1919. And they are all consistent with a contemplated relinquishment
MOFFETT of his acquired domicile. He had no home in Ireland or anywhere
v. but in South Africa from 1859, and no communications with any of
MOFFETT. his people in Ireland are proved, except in relation to payment off
 of a charge to which he had become entitled under his mother's
 will.

Nov. 18.

POWELL J.:—

The question which I have to decide is whether William Moffett, senior, who had an Irish domicile, lost that domicile and acquired a domicile in South Africa. [The learned Judge referred to the facts as above, and continued:—] Mr. Wilson contended that William Moffett, senior, never lost his Irish domicile. He cited the case of *Winans v. Attorney-General* (1) as an authority for the proposition that the onus of proving that a domicile has been chosen in substitution for a domicile of origin lies upon those who assert that the domicile of origin has been lost. The domicile of origin continues, unless a fixed and settled intention of abandoning the first domicile and acquiring another as the sole domicile is clearly shown.

Mr. Winans was born in the United States in 1823. In 1859 he came to London, and lived there in various places until his death in 1897. By his will he bequeathed an annuity to a relative, and the question in the appeal was whether he was at his death domiciled in England. If he was, legacy duty was payable; otherwise not. The Attorney-General having filed an information against the appellants, who were the executors, to recover the duty, Kennedy and Phillimore JJ. held that the testator was at his decease domiciled in England, and that the duty was payable. This decision was affirmed by the Court of Appeal (Collins M.R. and Stirling and Mathews L.JJ.). The arguments turned entirely on the true inference of fact to be drawn from the evidence, which is fully stated in Lord Macnaghten's judgment. The case was heard in the House of Lords by the Earl of Halsbury and Lords Macnaghten and Lindley. Lord Halsbury, referring to this question of domicile, said that so far as it was a question of law it was simple enough to state, but that when the law has been

(1) [1904] A. C. 287.

stated a difficult and complex question of fact arose which is almost always very hard to solve. He referred very briefly to the facts, and said that he was not able very confidently to answer the question as to the determination of Mr. Winans either way. Like all questions of fact, it depended upon a variety of smaller facts. It is impossible, he says, to treat this or that evidence as conclusive, and different minds will attribute different degrees of importance to the same facts; and he said that the conclusion he had come to was that he could not say that he had come to a satisfactory conclusion either way; but then, he says, the law relieves him from the embarrassment which would otherwise condemn him to the solution of an insoluble problem, because it directed him in such a state of matters to consider upon whom is the burden of proof. He said that undoubtedly the burden of proof was upon the Crown, and that as he could not bring himself to a conclusion either way, whether Mr. Winans did or did not intend to change his domicile, his domicile of origin must remain.

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Lord Lindley said that he had arrived at the same conclusion as that arrived at by Phillimore and Kennedy L.JJ., and by the Court of Appeal, and that Mr. Winans' one and only permanent home was in this country. Lord Macnaghten took the view that he was unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. It will thus be seen that two Judges of the King's Bench, three members of the Court of Appeal, and one member of the House of Lords were of opinion on the facts that Mr. Winans had acquired a domicile in England; Lord Macnaghten came to the opposite conclusion, and Lord Halsbury was not able to make up his mind. Lord Macnaghten's judgment, as one might expect, contains a compendious and very clear statement of the legal principles applicable to the question as laid down in very many cases of high authority, to some of which I shall have to refer later on. He then reviewed the principal events in Mr. Winans' life.

The facts in that case are so dissimilar to the facts in the present case that I do not think, and indeed Mr. Wilson did not suggest that this was a conclusive authority in his favour in this case, but he relied upon it as showing that the onus of proving a

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change of domicile rests with those who allege it, of which there can be no doubt, and he contended that in this case the onus had not been discharged.

I will now refer to some of the authorities which lay down the principles upon which this case must be decided. In *Udny v. Udny* (1) Lord Westbury says, at p. 448: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the terms. There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period, or a particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary or intended for a limited period may afterwards become general and unlimited, and in such a case, so soon as the change of purpose, or animus manendi, can be inferred, the change of domicile is established."

In *Haldane v. Eckford* (2) Vice-Chancellor James, having quoted this passage, says that the rule as laid down by Lord Westbury is the same in substance as the rule down in the same case by the Lord Chancellor, and continues: "I agree that it must be construed as differing from the rule as laid down in what may be called the intermediate class of cases in the Exchequer, following the decision in the House of Lords of *Moorhouse v. Lord* (3), in which, if I may use the expression, that unfortunate term "exuere patriam" was introduced as if it were a question of nationality and not of more or less permanence of residence. It does differ from those cases; but it differs in bringing back the law to that which, in my opinion, was always before those cases considered to have been the law, and evidently is the law, as laid down by the treatise-writers, namely, that domicile was to be considered as changed whenever there was a change of residence of a permanent character voluntarily assumed."

(1) L. R. 1 Sc. App. 441.

(2) L. R. 8 Eq. 631.

(3) 10 H. L. Cas. 272.

As to the word "permanent" in *Attorney-General v. Powell J. Pottinger* (1), Baron Bramwell expressed a preference for the word "indefinite." In *Douglas v. Douglas* (2) Wickens V.-C. says: "It seems to me, as it did to Vice-Chancellor James in *Haldane v. Eckford* (3), that the intention required for a change of domicile as distinguished from the action embodying it is intention to settle in a new country as a permanent home, and that if this intention exists and is sufficiently carried into effect, certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question might have intended the exact contrary."

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Doucet v. Geoghegan (4) was much relied on by Mr. Maxwell and Mr. Fford. The testator in the suit was a Frenchman. He had lived twenty-seven years in England, during the greater part of which time he was a partner in an English house of business, paying occasional visits to France. Though himself a Roman Catholic, he married successively in English churches two wives, who were Englishwomen and Protestants, and his children were brought up in England as Protestants. He made his will in the English form, and left his property in a manner inconsistent with French law. Upon an action to establish a French domicile numerous witnesses deposed that he had made various declarations that he intended to return to France when he had made his fortune. It was also proved that he always refused to be naturalized in England, and would not take a lease of more than three years of his house. It was held by the Court of Appeal (Jessel M.R. and James and Brett L.JJ.), affirming the decision of Vice-Chancellor Malins, that the acts of the testator manifested an intention to acquire an English domicile, and that his declarations of intention to return to France when he had made his fortune were not sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages. It was proved in that case by Madame Doucet that the testator always and continuously expressed an intention of returning to live in France when he had sufficient money to enable him to do so. Jessel M.R., having stated the principal facts, said: "We have here these facts,

(1) 6 H. & N. 733.

(2) L. R. 12 Eq. 617.

(3) L. R. 8 Eq. 631.

(4) 9 Ch. D. 441.

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that he was resident in England, that his business was carried on in England, and that he had married a wife in England, and that his second wife was also an Englishwoman and a Protestant. He married his second wife in England in a Protestant church. He had three children by his marriage, and the year before his first child was born he made a will in the English language leaving all his property to his wife; he must have known that as he had children this will would not be valid according to the French law; he disposes of his property, notwithstanding the existence of children, in a way which every Frenchman knows is repugnant to French law. Against this evidence there is nothing except the testimony of some witnesses that he made some declaration in actual conversations of an intention to return to France when he had made money enough; but this evidence is not contradicted by evidence on the other side, by declarations that he intended to remain in England. I cannot help thinking that it would be dangerous to admit declarations in casual conversations, even if uncontradicted, to outweigh all the acts of a man's life, and every document executed by him, for it is important to observe that there is no document which expresses an intention to return to France, while on the other side there are two wills which are inconsistent with such an intention. Dr. Lushington says in *Hodges v. Beauchesne* (1): 'We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long, and so continuous as to raise a presumption nearly, if not quite, amounting to a *presumptio juris et de jure*—a presumption not to be rebutted by declarations of intention or otherwise than by actual removal.' The contention here is, not that the declarations can be read to show a change back to his original domicile, but to prove that he never intended to acquire a domicile in England; but they are much too indefinite for that purpose. A declaration that a man means to return when he has acquired a fortune is not sufficient to outweigh actions which show an intention of permanent residence. In all cases a difficulty arises as to the meaning of the word 'domicil,' but it evidently implies the intention to make a place one's home, and a home is itself suggestive of permanency.

(1) 12 Moo. P. C. 285.

It is impossible to lay down an absolute definition of domicile, but in the present case there is every element that makes a home. The testator had no other home or place of residence. He showed by his actions no intention to change his residence. It is true that he only took his house for three or four years, but that is not sufficient to show an intention to change his residence. On the whole it appears to me that there is nothing to outweigh the natural results of his acts, and that, looking at his acts fairly, as a jury ought to do, the Court can come to no other conclusion than that his domicile was English." Lord Justice James in his judgment refers to his judgment in *Haldane v. Eckford* (1), and says that he adhered to the observations which he there made. He says: "Both the marriages were acts of unmitigated scoundrelism if the testator was not a domiciled Englishman. He brought up his children in this country. He made a will in this country professing to exercise testamentary rights which he would not have had if he had not been an Englishman. Then with respect to his declarations, what do they amount to? He is reported to have said that when he had made his fortune he would go back to France. A man who says that is like a man who expects to reach the horizon, and finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life." Lord Justice Brett said: "The question is whether we think that on the facts before him the Vice-Chancellor was right in his opinion. It is said that to prove a change of domicile it is necessary to show both fact and intention. What is the fact which must be proved? It is that he had de facto changed his residence. What then was his residence? I think it is satisfactorily proved that he had taken up his residence in this country. Then, as to his intention, had he the intention of residing in England permanently? The definition of permanence is that it is not only for a period, but either for a definite time or for a time limited by a condition. It is, therefore, necessary in the first place to determine whether the testator resided in this country as his home. It was proved that he entered into business in England, that he

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married Englishwomen by whom he had children, and that he never expressed an intention that his wife and children should have any other home. It has not been seriously argued that the testator meant to return at the end of twenty years, or of any such fixed period, but it was said that he limited the time by reference to the performance of a condition, namely, of his making a fortune. I think such a condition is not sufficient. It ought to be a condition which limits the residence to a definite time, and when the condition refers only to a time as indefinite as it can possibly be, it cannot be said to confine the residence to a definite time. There can be nothing so indefinite as the time at which a man expects to make a fortune. Therefore, as the testator did not fix a date or make any definite condition by which the residence was limited to a definite time, it must be taken that his intention was to make his residence in England permanent. Therefore, the other proposition is established by the evidence."

In Storey's Conflict of Law, sect. 43, it is stated that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom.

In *Davis v. Adair* (1) all these cases are referred to by the Master of the Rolls, and in the Court of Appeal by Lord Chancellor Walker. The Chief Baron in the Court of Appeal, in dealing with the question of declarations of intention to return, says that the "declarations indicate an expectation, a desire, or possibly an intention, to return to England at some future period. The period of return contemplated is referred to in terms of the utmost vagueness, involving contingency, not only according to the facts then actually existing, but also in reference to those facts which were in the contemplation of the person whose domicile was in question. He would return 'eventually,' 'ultimately,' 'when he had got through with his business,' 'when he had made his fortune.'" The Lord Chief Baron further says that, "assuming that which is far from clear, that the true inference of fact from these declarations is that he did continue during his stay in America to entertain an actual present intention as distinguished from an expectation or desire to return to England, the question is, what is the effect in law of such intention upon his acquisition

of a domicile of choice," and he says that this depends "upon the true character of the *animus manendi* which, when coupled with the *factum* of residence, establishes such a domicile." He then refers to the judgment of Lord Chelmsford in *Moorhouse v. Lord* (1), in which Lord Chelmsford says: "The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there without looking forward to any events, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this a present intention of making a permanent home; it is rather the present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that it has been the deliberate choice of a permanent home." The Chief Baron says that in his opinion the decision in *Udny v. Udny* (2) involves a determination that the above passage of Lord Chelmsford's judgment is not an accurate statement of the law, and then he gives what he calls the true description of the *animus manendi* which the House of Lords substituted in *Udny v. Udny* (2) for the view taken by the Court in *Moorhouse v. Lord* (1). He then refers to the statement of the law pronounced by Lord Westbury which I have quoted. The Lord Chief Baron then said that it appeared to him to follow as a corollary from the description of domicile which he had read from the opinion of Lord Westbury that "declarations such as we have here, indicating an intention to return upon an event which is contingent in fact, which is not contemplated by the individual as reasonably certain, and which cannot happen until after a period of time unlimited and indefinite, are consistent with instead of being destructive of the necessary intention. It follows that although when the time pointed at has arrived, and there has been an actual change of residence, such expressions may be of importance on the question of the change of the acquired domicile; they are of little, if, indeed, of any weight, in preventing the acquisition of a domicile"; and the Chief Baron expressed the

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(1) 10 H. L. C. 272.

(2) L. R. 1 Sc. App. 441.

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opinion that "taking the definition of domicile from *Udny v. Udny* (1), the declarations in the case before him were entitled to absolutely no weight, and he thought that the decision involved that they should be entirely excluded from consideration." Such, he said, was the uniform course of the decisions before *Moorhouse v. Lord* (2); and although the decisions after *Udny v. Udny* (1) do not seem to go the full logical length of holding that they are entitled to no weight, the reasoning in his opinion necessarily led to that conclusion, and left nothing wanting except the courage to hold that it is inevitably involved in the ratio decidendi. As an instance of the law prior to *Moorhouse v. Lord* (2) he referred to the opinion of the House of Lords as expressed by Lord Thurlow in *Bruce v. Bruce* (3). "There, expressions almost identical with those in question in *Davis v. Adare* (4), if not indeed, stronger, were relied upon, and were disposed of by Lord Thurlow in the following words: 'He meant to return to his native country, and let it be granted he then meant to change his domicile, but he died before actually changing it''"; and the Chief Baron said that that sentence expressed exactly his view of the value and effect of such declarations.

In this case William Moffett left this country in the year 1858, and from that time until his death in 1893, a period of thirty-five years, he never returned. In the country to which he went he married twice; he took employment in that country, and he set up business in that country. Moreover, he legitimized a son born out of wedlock; and if it were unmitigated scoundrelism for Doucet to have contracted in England a marriage which would have been void in France, if he actually intended to return to France, it would, I think, have been a useless performance to have gone through this ceremony, so far as his son was concerned, if he had no intention of continuing to reside in the country in which the ceremony would have the effect of making his son legitimate. When he came to make his will he adopted the testamentary formalities of the country which he had adopted. He made a joint will with his wife, which is unknown in this country, and in some respects the provisions of that will were in conformity

(1) L. R. 1 Sc. App. 441.

(2) 10 H. L. C. 272.

(3) 2 Bosanquet & Puller, 229 n.

(4) [1895] 1 L. R. 379.

with the testamentary laws of his adopted country, and not with those of this country. In other words, in the language of Lord Justice James, he professed to exercise testamentary rights which he would not have if he had not been domiciled in the country in which the will was executed. The main contention, I think, against the view of his being domiciled in South Africa was founded upon his declarations. His widow, that is his second wife, says that he always claimed that he was returning to Ireland, but that he could not save or make sufficient money for the expense of the journey, so that his expectations of reaching the horizon were, unfortunately for her, very indefinite. She says that during the whole period of the marriage he always spoke to her of this return to Ireland. In *Davis v. Adare* (1) it was proved that Mr. M'Andrew had always said that when he got older and through with his business he would go back home to England; that he always stated that his ultimate intention when the proper time came was to go back to his home in that country when he had made his fortune. One witness said that he (the witness) always had a positive belief that he would return, and that he had heard Mr. M'Andrew state that that was his intention, that sooner or later he would go back to England; that he always heard him refer to England as his birthplace, and the finest place in the world, and the only place in the world.

I do not think the expressions of intention to return as deposed to in this case are as strong as the expressions deposed to in *Davis v. Adare* (1), and yet the Chief Baron described them as being entitled to absolutely no weight, having regard to the decision in *Udny v. Udny* (2); that they were perhaps indications of an intention to return upon an event contingent in fact, not contemplated by the individual as reasonably certain, and which could not happen until after a period of time unlimited and indefinite. I think that the evidence contained in the affidavit of Mr. Hammond, in which he says that he gathered from conversations with Mr. William Moffett, and from his conduct generally, that he desired to return to his people in Ireland, is entitled to no weight—a remark which I think is also applicable to the evidence of Mr. Morris in reference to the Irish

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(2) I. R. 1 Sc. App. 441.

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doctors. All these declarations of intention might possibly be evidence of an intention to resume his domicile of origin if in fact he returned to this country; but, in my opinion, they are not sufficient to outweigh the natural result of his acts, and I think that, looking at his acts as a jury ought to do, I can come to no other conclusion than that his domicile was South Africa.

The arguments in this case were confined to the question which I was told was the only question I was asked to decide, namely, whether the domicile of William Moffett, senior, at the time of his death was a South African domicile or an Irish domicile. After I had delivered judgment, Mr. Wilson said there were two other questions to be determined, namely, what was the domicile of Moffett at the date (a) of the birth of his illegitimate son in 1864 by Elizabeth Anne Hastings Cleary? and (b) of the date of his marriage in 1867 to Elizabeth Anne Hastings Cleary? As I have all the facts before me, I did not consider it necessary to put the parties to the expense of any further arguments on these two questions, and I intimated to counsel that I would decide these questions at once, so that the whole matter would be before the Court above in the event of an appeal.

In *King v. Foxwell* (1) Sir George Jessel says: "What is domicile? I had had before me a great number of authorities, and the conclusion I draw is this, that in order that a man may change his domicile of origin he must choose a new domicile by fixing his sole or principal residence in a new country, that is, a country which is not his country of origin, with the intention of residing there for a period not limited as to time."

In *Cockrell v. Cockrell* (2) Vice-Chancellor Kindersley says: "Length of time (that is, of residence) is considered one of the criteria or one of the indicia from which the intention to acquire a new domicile is to be inferred, and it is considered a very material ingredient in the consideration of the question. In the case of *The Harmony* (3) Lord Stowell said (at page 324): 'Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile.' Some foreign jurists have suggested, if they have not actually laid it down, that a period of ten years ought of itself to be a

(1) 3 Ch. D. 518.

(2) 25 L. J. Ch. 730.

(3) 2 Rob. A. 322.

sufficient indication of the intention to acquire a new domicile. But certainly that is not the view of the law that has been adopted by English jurists generally, and I think it is impossible to lay down any precise period which per se is to constitute domicile. At the same time, if a man goes to another country, and continues to reside there for a considerable period, as in this case for a period of ten years, without saying that a residence of ten years is necessary, or that ten years is the period sufficient, still the fact of his residing there for ten years is a very strong indication of his intention to establish his home and domicile in that place.”

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I have already set out the facts which have influenced me in coming to the conclusion that William Moffett acquired a domicile in South Africa. These facts also lead me to the conclusion that after he had been dismissed from the army in 1861, and before the birth of his illegitimate son in 1864, and before he legitimized him by marrying the mother of that son in 1864, he had chosen a new domicile in a new country, namely, South Africa, with the intention of residing there for a period not limited as to time.

It is true that he originally went to South Africa as an officer to be quartered temporarily with his regiment, but “an intention of permanent residence may often be ingrafted upon an inhabitancy originally taken for a special or fugitive purpose”: Story’s Conflict of Laws, par. 45, p. 52. The same learned author in par. 45a, p. 53, in dealing with the opinion of certain jurists that in certain events a man might have two domiciles, refers “to the decision of Chief Justice Shaw in a case in Massachusetts, in which he laid down, first, that every person must have a domicile somewhere; second, that a person can have only one domicile for one purpose at one and the same time.”

If I am right in my view in the present case for the reason that I have stated, that Wm. Moffett abandoned his Irish domicile and acquired a South African domicile, what was his domicile in 1864, three years after his dismissal from the army, and in 1867, six years after that event? I am of opinion that it was a South African domicile, because I think that he had before the earlier period formed the intention, evidenced by the subsequent length of residence in the new country, and the other facts to which I have referred, which, I think, are indicia from which such intention ought to be inferred, of fixing his sole or principal residence in the new country for a period not limited as to time.—D. M. S.

Appeal.
1920.

MOFFETT

v.

MOFFETT.

Feb. 4, 9.

The defendant Thomas B. Moffett appealed to the Court of Appeal (1).

The Court, without calling on counsel for the respondent, affirmed the decision of Mr. Justice Powell.

Solicitors for the defendant Thomas B. Moffett: *E. & G. Stapleton.*

Solicitors for the defendant William E. Moffett: *Maxwell, Weldon, & Co.*

R. ST. J. C.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and
RONAN and O'CONNOR L.JJ.

EX PARTE THE SOUTH DUBLIN RURAL DISTRICT	<i>Appeal.</i>
COUNCIL. HENRY GILSON, APPELLANT; JAMES	1920.
M'CREERY BENNETT, RESPONDENT (1).	Jan. 13.

(1919. No. 40.)

Practice—Appeal—Final or interlocutory—Costs of respondent on abortive appeal.

A notice of appeal in an interlocutory matter was served upon the intended respondent, whose solicitors thereupon prepared briefs for the appeal, and handed same to counsel. The appeal was in fact taken late, and the Registrar accordingly refused to set it down, but this fact was not intimated to the intended respondent. On an application by the latter to the Court of Appeal:

Held, that he was entitled to all costs necessarily and properly incurred by him under the notice of appeal served upon him.

The South Dublin Rural District Council, under the powers conferred upon them by the Labourers (Ireland) Acts, 1883-1914, and the Local Government (Ireland) Act, 1898, and the Acts incorporated therewith, and the South Dublin Rural District Labourers Order, 1914, acquired part of the lands of Crumlin, in the County of Dublin, and subsequently lodged in Court the sum of £60 7s. 6d., being the compensation awarded in respect of the lands so acquired.

On the 16th January, 1918, James M'C. Bennett, the above-named respondent, issued a summons in the Court of Mr. Justice Powell for payment out to him of the said sum of £60 7s. 6d., on the hearing of which summons Henry Gilson, the above-named appellant, appeared, and claimed to be entitled to the said sum, the question of title between the two claimants depending upon the true construction of the will of one Thomas M'Creery, a former owner of the lands which had been acquired by the Rural Council.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and
RONAN and O'CONNOR L.JJ.

Appeal. On the 11th March, 1919, Mr. Justice Powell decided that on
 1920. the true construction of the will the said James M'C. Bennett
 GILSON was entitled to the money in Court, and directed payment of the
 v. same to him.
 BENNETT.

On the 9th June, 1919, a twenty-one days' notice of appeal against this order of the 11th March, 1919, was served on behalf of the said Henry Gilson on the solicitors for the said James M'C. Bennett, who thereupon prepared briefs for counsel on the hearing of the appeal, and handed these to counsel.

As the said appeal was not a final appeal, and was out of date, the Registrar of the Court of Appeal refused to set down the appeal, but this fact was not intimated to the solicitors for James M'C. Bennett, who had not themselves inquired whether or not the appeal had been in fact set down.

A subsequent correspondence between the solicitors for the respective parties as to the costs incurred took place, but no agreement was arrived at, whereupon this motion was instituted by James M'C. Bennett for an order that Henry Gilson might be ordered to pay to him his costs incurred under the notice of appeal as an abandoned motion, and that the appeal might be dismissed for want of prosecution, and for the costs of the application.

Murnaghan, for the applicant :—

The solicitors for the applicant were entitled to treat the notice of appeal served upon them as a good notice. No solicitor could in a doubtful case take the responsibility of treating a notice of appeal as bad, and make no preparations for the appeal. I rely on *Charlton v. Charlton* (1).

H. Wilson K.C., for Henry Gilson :—

It is the duty of a solicitor for a respondent in every case to attend before the Registrar, and ascertain that the appeal has in fact been set down before he incurs further expense. Here the solicitor for the applicant acted prematurely. In *Charlton v. Charlton* (1) the appeal could have been set down. Here it could not have been.

SIR J. CAMPBELL C. :—

We would be imposing a great responsibility on solicitors and counsel if we were to hold that in all cases, some of them possibly of considerable doubt, they must decide for themselves whether the notice of appeal served is good or bad, and whether an appeal is final or interlocutory, before any further costs are incurred on behalf of their clients. Some of the costs in this case may have been incurred prematurely, but that will be a matter for the taxing master. We must declare the applicant entitled to all such costs of the abandoned appeal as have been necessarily and properly incurred.

Appeal.
1920.
GILSON
v.
BENNETT.

Solicitors for the applicant : *Hoey & Denning.*

Solicitors for Henry Gilson : *Cochrane & Co.*

R. ST. J. C.

Appeal.

1920.

Jan. 20.

IN THE MATTER OF THE ESTATE OF PATRICK CAWLEY,
DECEASED. JOHN ROBERTSON, PLAINTIFF; ANNIE
FLYNN, BRIDGET NEARY, AND MARY WALSH,
DEFENDANTS (1).

*Will—Construction—Ambiguity—Misdescription—Instructions for will—
Evidence.*

A testator by his will devised and bequeathed all his property to a sister, describing her as "Annie Neary." He had in fact four sisters, the above-named defendants Annie Flynn, Bridget Neary, and Mary Walsh, and an unmarried sister Dora, all of whom lived in America.

From the contemporaneous written instructions for the will given by the testator to his solicitor it appeared that the testator stated that he had three sisters, whose names he gave as Annie Neary, Beesie (without mentioning her surname), and Mary Walsh.

Held, by the Court of Appeal (affirming the decision of Powell J.), that the Court was entitled to look at the written instructions for the purpose of ascertaining the testator's knowledge as to his family relations, and that, on the true construction of the will, the sister Annie Flynn was entitled to the property.

Patrick Cawley, of Killala, Co. Mayo, made his last will on the 1st August, 1918, and died on the same day. The will provided as follows:—"I give, devise, and bequeath all my property of every description both real and personal and wheresoever situate to my sister Annie Neary who is living in America in case she survives me. If my said sister Annie Neary predeceases me I will devise and bequeath all my said property both real and personal to her children who shall be living at my death equally between them share and share alike."

At the date of his will the testator had four sisters living, Mrs. Mary Walsh, Mrs. Annie Flynn, Mrs. Bridget or Beesie Neary, and an unmarried sister Dora. All these sisters had been living in America for a number of years, and the testator was unacquainted with any of the husbands of the sisters who had married.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and
RONAN and O'CONNOR L.JJ.

The plaintiff, the executor named in the will, having obtained probate, issued the present summons for the determination of the questions whether Annie Flynn or Bridget Neary was entitled to the real and personal property of the testator, or whether the gift of such property failed.

Appeal.
1920.
ROBERTSON
v.
FLYNN.

In an affidavit sworn for the purpose of the summons Mr. Henry C. Bourke, a solicitor, swore that the deceased testator gave him personal instructions for his will, and that he took down the instructions in writing; and he made an exhibit of the original instructions, from which it appeared that the testator stated that he had three sisters, one named Annie Neary, another named Beesie, and a third named Mary Walsh. The will was then prepared in accordance with the testator's wishes to benefit "Annie Neary."

By an order dated the 3rd November, 1919, Mr. Justice Powell declared that the defendant Annie Flynn was entitled to the real and personal estate of the testator, whereupon Bridget Neary and Mary Walsh appealed to the Court of Appeal.

Leonard K.C. (*Shannon* with him), for the appellants:—

It is impossible to say whether the testator intended to benefit Mrs. Annie Flynn or Mrs. Bridget Neary, and the result is an intestacy, the will being void for uncertainty. I admit that the Court may look at the instructions, but not for the purpose of ascertaining the intentions of the testator. They can only be looked at to find out the material facts in the knowledge of the testator at the time: *Wigram: Propositions III, V, and VI*. In *Drake v. Drake* (1), where the testator gave a name and description of a legatee which, taken together, could not be applied to any one person, an affidavit by the solicitor who prepared the will as to the cause of the mistake was held inadmissible as extrinsic evidence.

[They also cited *Charter v. Charter* (2); *In re Ofner* (3); *In re Ray* (4).]

G. Fetherstonhaugh K.C. and *Poole*, for the respondent, were not called on.

(1) 8 H. L. Cas. 172.
(2) L. R. 2 P. & D. 315.

(1) [1909] 1 Ch. 60.
(2) [1916] 1 Ch. 461.

Appeal.

1920.

ROBERTSON
v.

FLYNN.

SIR JAMES CAMPBELL C. :—

The question in this appeal turns on the meaning of a will the terms of which are *prima facie* precise and clear. [His Lordship read the will, and continued :—]

At the date of this will the testator had four sisters, all living in America, namely, Mrs. Annie Flynn, Mrs. Mary Walsh, Mrs. Bridget Neary, who appears to have been called Beesie, and an unmarried sister Dora, who had become a professed nun. The question then is : which of these sisters the testator intended to benefit ? If the matter depended merely upon the language used by the testator, some difficulty would arise, but we are all of opinion that we are entitled to look at this contemporaneous document, the written instructions for the will, to ascertain or to assist us in ascertaining what the testator's knowledge was as to his sisters, and their description, and once we do look at it all difficulty disappears from the case. In this he refers to his three married sisters. Mary Walsh he correctly describes ; he refers to Beesie by her proper Christian name, and the only remaining married sister Annie he refers to by her proper Christian name, and then is her identity destroyed by his misdescribing her married name ? His sister Annie did not cease to be his sister Annie because she married a husband named Neary. In my opinion all doubt is removed when we look at this contemporaneous document, and accordingly I think that the decision of Powell J. was correct, and should be affirmed.

RONAN L.J. :—

I treat this document, which has been called the instructions for the will, as a statement by the testator to his solicitor of his knowledge about his family. He said he had three sisters, Mary, Beesie, and Annie ; the fourth, Dora, he ignored, as being a nun, and therefore dead to the world. There can be no doubt but that he intended by his will to leave this property to one of these sisters. He plainly did not intend to leave it to Mary Walsh, both of whose names he knew. Was it to Beesie Neary ? No, because he did not identify the name "Neary" with "Beesie." But if it was not to Beesie, we arrive by the process of exclusion at Annie.

Speaking for myself, I am strongly inclined to the opinion that, even without the help we derive from this contemporaneous document, we should arrive at the same conclusion. Where a man makes a bequest to a sister designating her by her Christian name, I think that a mistake as to her married name following on her correct Christian name is a secondary error, and immaterial, as it is by her Christian name that a man would naturally from his youth up identify his sister.

I think that the judgment of Powell J. is in accordance both with law and common sense, and ought to be affirmed.

O'CONNOR L.J. concurred.

Solicitor for Bridget Neary and Mary Walsh: *Patrick J. Rutledge.*

Solicitor for Annie Flynn: *John Garvey.*

R. ST. J. C.

HUGH FERGUSON *v.* JOSEPH HENRY FERGUSON
AND OTHERS.

(1871: No. 1404.)

Powell J.
1920.

Feb. 16.

Practice—Abatement—Death of parties—Further inquiry without revivor.

In a suit brought by one trustee against the other trustee and beneficiaries to be relieved from his trust, the fund was ordered to be brought into Court, and the dividends paid to a person who under the trust was entitled to the fund for her life. After her death, the plaintiff and several of the defendants being then dead, three of the surviving defendants applied for an inquiry as to the persons entitled to the fund.

It was referred to Chambers to ascertain who were entitled to the fund without any order to continue proceedings.

MOTION.

The plaintiff was a trustee of an indenture of settlement dated 24th March, 1865, and by the Bill of Complaint he prayed that he might be discharged from being such trustee, and that certain inquiries might be made and directions given with respect to the funds comprised in the said settlement; by a decree, dated 9th

Powell J. May, 1872, certain inquiries were ordered and directions given.
1920. Pursuant to a further order made on the 22nd July, 1875, moneys
FERGUSON were lodged in Court from time to time by the trustees; the
v. dividends on the funds in Court were, by order of the Court, paid
FERGUSON. to the tenant for life under the settlement until her death on 29th
June, 1919. The plaintiff and two of the defendants died many
years previously; another defendant left Ireland before 1875, and
had not since been heard of. The suit was never revived.

Macrory, on behalf of three of the surviving defendants, beneficiaries under the settlement, applied for an order that it be referred to Chambers to inquire who were the persons interested in or entitled to the funds in Court and the dividends thereon, and in what proportions, and submitted that it was not necessary to revive the suit. He referred to *Risely v. Sheppard* (1); *Schram v. Baker* (2).

Cox, for Jane Josephine Ferguson, who claimed to be entitled to a share of the funds, supported the application.

His Lordship stated that for the purpose of such inquiry it was not necessary to revive the suit, and made the Order sought.

Solicitors for the applicants: *White & White.*

Solicitor for Jane Josephine Ferguson: *W. J. M. Coulter.*

M. G. E.

(1) [1873] W. N. 150.

(2) [1873] W. N. 78.

IN THE MATTER OF ALLIBON'S PATENT AND THE
PATENTS AND DESIGNS ACT, 1907.

(1919. No. 921.)

Ross J.
(for M.R.)
1920.

Jan. 28.

Practice—*Petition for extension of patent*—*Term of patent extended by statute passed after presentation of petition*—*Patents and Designs Act, 1907* (7 Edw. 7, c. 29), ss. 17, 18—*Patents and Designs Act, 1919* (9 & 10 Geo. 5, c. 80), s. 6.

Where the term of a patent has been extended by an Act of Parliament passed subsequent to the presentation by the patentee of a petition under sect. 18 of the Patents and Designs Act, 1907, the petition must be adjourned generally.

In re Macintosh's Patent (Webster's Patent Cases, 739) followed.

PETITION.

On the 14th May, 1906, C. H. Allibon, one of the petitioners, obtained a patent, No. 11,215 of 1906, relating to pens used in the manufacture of artificial fertilizers, and on the 23rd July, 1907, it was assigned to Messrs. W. and H. M. Goulding, Ltd. Considerable expense was incurred by the patentee and the assignees in perfecting the invention, but, owing to the outbreak of the war, it was impossible to do anything in the way of exploiting it. Accordingly, on the 13th November, 1919 (which was the latest possible date), the patentee and Messrs. W. and H. M. Goulding, Ltd., presented a petition under sect. 18 of the Patents and Designs Act, 1907, praying for an extension of the term of the patent for a further term of seven years from the date of the expiry thereof. On the 5th December, 1919, the petitioners took out a summons to fix the date of hearing of the petition, and an order was made thereon on the 15th December, 1919, fixing the 23th January, 1920, and directing advertisements. On the 23rd December, 1919, the Patents and Designs Act, 1919, received the Royal Assent. Sect. 6, sub-s. 1, of that Act provides that "the term limiting the duration of patents shall be increased from fourteen to sixteen years, and accordingly in sub-s. 1 of sect. 17 of the principal Act" (i.e. the Patents and Designs Act, 1907), "for the word 'fourteen' there shall be substituted the word 'sixteen.'"

On the petition coming on for hearing, counsel on behalf of the Comptroller, Industrial and Property Department of the Board of Trade, objected that the application was premature.

Ross J.
(for M.R.)
1920.

In re
ALLIBON'S
PATENT.

S. L. Brown K.C. (with him *Overend*), for the petitioners:—

The petition was filed at the proper time: Patents and Designs Act, 1907, sect. 18, sub-s. 1; at that time the Act of 1919 had not been passed. It is all-important for the petitioners to know definitely how they stand, as they want to enter into sub-contracts for the manufacture and sale of the invention. The two years' extension given by the Patents and Designs Act, 1919, is not sufficient for this purpose, and the petitioners are therefore entitled to know now whether the term of the patent will be extended.

Wylie K.C. (with him *G. W. Shannon*), for the Board of Trade:—

The principal ground for extending the term of a patent is the insufficiency of the profits made by the patentee. The effect of sect. 6, sub-s. 1, of the Patents and Designs Act, 1919, is to substitute sixteen years for fourteen years as the term of the duration of a patent. The petitioner's patent has, therefore, two and a half years still to run, and the profits which the petitioners may make during that time may materially affect the question of extension: *In re Macintosh's Patent* (1).

Ross J.:—

The term of the duration of this patent has been extended to sixteen years by sect. 6, sub-s. 1, of the Patents and Designs Act, 1919. Therefore, although the petitioners were right in bringing the petition at the time when it was brought, as the case now stands the patent has still over two years to run. By sect. 18, sub-s. 4, of the Patents and Designs Act, 1907, one of the matters to which the Court must have regard in considering whether the term of a patent shall be extended is the profits made by the patentee, and there is obviously no means of computing what profits may be made from this invention during its original term as so extended. The petitioners are in the same position as if they had made their application under the law as it formerly stood two years before the extension of the patent, and in such case the application would be premature. In these circumstances I am of opinion that this case is governed by the decision in *In re Macintosh's Patent* (1), and I will adjourn the petition generally.

Solicitors for the petitioners: *A. & L. Goodbody*.

Solicitors for the Board of Trade: *D. & T. FitzGerald*.

A. H. W.

PATRICK M'DONNELL v. SARAH STENSON.

(1919. No. 944.)

Powell J.

1919.

Dec. 2.

1920.

Jan. 20.

Landlord and tenant—Lease for three lives and ninety-nine years, whichever shall continue longest—Covenant by landlord to nominate new life on death of every cestui que vie before expiration of term of ninety-nine years—Non-renewal—Death of tenant intestate—Tenancy for term of years—Estate par autre vie.

By indenture made in 1832, lands were granted to M., his heirs and assigns, for the lives of three persons, or for the term of ninety-nine years, whichever should continue longest, with a covenant by the landlord that on the death of each cestui que vie dying during the term the landlord would nominate another life in place of that of the cestui que vie so dying. The cestuis que vie named in the lease died in 1863, 1864, and 1893 respectively; no new life was ever nominated. The tenant died intestate in 1918.

Held, that there was an equitable freehold in the lands comprised in the lease.

ORIGINATING SUMMONS.

By indenture dated 1st February, 1832, Sir Francis Lynch Blosse demised and granted to James M'Ellinn certain lands "to have and to hold all and singular the said premises hereby demised or intended so to be, with their and every their appurtenances (except as before excepted), unto the said James M'Ellinn, his heirs, executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the natural life and lives of Robert Lynch Blosse, William Lynch Blosse, and Francis Lynch Blosse, the first, second, and third sons of the said Sir Francis Lynch Blosse, and for and during the natural life and lives of such other person or persons as by virtue of a clause for renewal hereinafter mentioned may be added thereto, and for and during the term, time, and space of ninety-nine years, to commence at and be computed from the first day of May last past, whichever of the said lives or years shall continue longest," at the rent of five shillings per year. The covenant for renewal contained in the said lease was as follows: "And the said Sir Francis Lynch Blosse doth for himself, his heirs,

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M'DONNELL
v.
STENSON.

executors, administrators, and assigns, covenant, promise, and agree to and with the said James M'Ellinn, his heirs and assigns, in manner following, that is to say, that in case the cestui que vie in this indenture named should happen to die before the expiration of the said term of ninety-nine years, that then and in such case he, the said Sir Francis Lynch Blosse, his heirs and assigns, shall and will, on the death of the person so happening first to die as aforesaid before the expiration of said term of ninety-nine years, and on payment of all rent and arrears of rent then due and owing, add and insert to the time and term of this demise the life of such person as he, the said Sir Francis Lynch Blosse, his heirs or assigns, shall nominate and appoint in the place and stead of the person so happening first to die as aforesaid, which life so to be added and inserted is to be endorsed on this indenture, or written on a separate deed or label for that purpose, and in like manner from time to time during the said term of ninety-nine years upon the death or failure of any other cestui que vie in this indenture named or hereafter to be successively nominated as aforesaid, and upon payment of all arrears of rent which shall then be due, that then he, the said Sir Francis Lynch Blosse, his heirs and assigns, shall and will immediately after the death or failure of every other such cestui que vie so successively happening to die before the expiration of said term of ninety-nine years as aforesaid, add and insert to the time and term of this demise the life of such other person as he, the said Sir Francis Lynch Blosse, his heirs or assigns, shall nominate, which several lives so to be nominated and inserted successively are to be endorsed on this indenture, or written on separate deeds or labels as aforesaid."

By another indenture, dated 28th August, 1855, Sir Robert Lynch Blosse demised and granted to Patrick M'Ellinn other lands, to hold unto the said Patrick M'Ellinn, his heirs and assigns, during the lives of three cestuis que vie therein named, and for the term of ninety-nine years, whichever of the said lives or years should continue longest, with a covenant for renewal similar to that contained in the said lease of 1st February, 1832. The cestuis que vie named in the lease of 1st February, 1832, died in 1863, 1864, and 1893 respectively; those named in the lease of 28th August, 1865, died in 1870, 1893, and 1915 respectively; no new life was ever

nominated in the case of either lease. Both the said leases became vested in Barbara M'Donnell, who died intestate on 11th February, 1918. The plaintiff was the heir-at-law of Barbara M'Donnell, and the defendant was administratrix of her personal estate. The summons was brought for an order declaring who was entitled to the two leases.

Powell J.
1919.
M'DONNELL
v.
STENSON.

James Henry, for the plaintiff:—

The plaintiff is within the equity of the Tenantry Act; there is no time after the death of a cestui que vie within which the renewal must be made; the non-renewal was not owing to any laches on the part of the tenant, but to the default of the landlord, whose duty it is to renew under the covenant. Since the granting of the respective leases possession has continued as before, and the rents have always been paid and received. The tenant is entitled to a renewal at any time during the term of ninety-nine years: *M'Dermott v. Caldwell* (1); *Lyne on Leases*, at pp. 64 and 220.

Carson, for the defendant:—

The Tenantry Act has no application by analogy or otherwise where the covenant is one to renew within a limited period only. The tenant having failed to obtain a renewal within a reasonable time after the death of the last surviving cestui que vie, the right to renewal was lost, and the lands were thenceforth held for the alternative term of ninety-nine years: *Hussey v. Domville* (2), at p. 444; *Domville v. Callwell* (3); *Hussey v. Domville*, No. 2 (4). The object of the alternative term of years was to protect the tenant in the event of his losing the right of renewal, and the creation of the term shows that the tenant might lose that right.

POWELL J.:—

This is an originating summons brought by the plaintiff, claiming to be entitled to certain premises as heir-at-law of one Barbara M'Donnell, deceased, against the defendant, the administratrix of the deceased, for the determination of a question arising

1920.
Jan. 20.

(1) I. R. 10 Eq. 504.

(2) [1900] 1 I. R. 417, 428.

(3) [1907] 2 I. R. 617.

(4) [1903] 1 I. R. 265.

Powell J. in the administration of the estate of the deceased, namely,
1920. whether two houses, situate at Balla, in the County of Mayo, held
M'DONNELL respectively under two indentures of lease dated 1st February,
v. 1832, and 28th August, 1855, are property which passes to the
STENSON. plaintiff, the heir-at-law of the deceased, or whether they are
personal estate and vest in the defendant?

[His Lordship read the habendum and the covenant for renewal in the lease of 1st February, 1832, and said that the habendum and covenant for renewal in the lease of 28th August, 1855, might be considered as identical for the purpose of the present case.]

According to the affidavit of Samuel George Rutherford, solicitor for the plaintiff, Robert Lynch Blosse, the first life in the first lease, died in 1893; William Lynch Blosse, the second life in the first lease, died in 1863, and Francis Lynch Blosse, the third life in the first lease, died in 1864. As to the lives in the lease of 28th August, 1855, Sir Robert Lynch Blosse died in December, 1893; William Cunningham Lynch Blosse died in 1870, and Francis Lynch Blosse died in 1915. Mr. Rutherford, in his affidavit, further says that he searched in the Registry of Deeds, and made inquiries with a view of ascertaining if these leases or either of them had been renewed, and that he believed as a result that the leases had not been renewed, and this fact is not in dispute. It also appears from Mr. Rutherford's affidavit that the Lynch Blosse Estate, upon which the property referred to is situate, was sold to the Congested Districts Board, and that the deceased had signed an agreement for the purchase of (inter alia) these premises, which are described as being held under the lease mentioned.

The holdings purported to be vested in the deceased on the 29th May, 1919, but as this vesting was subsequent to the date of the death of the deceased, it is, of course, void, and the holdings will have to be vested in the proper person before they can be registered under the provisions of the Local Registration of Title (Ireland) Act, 1891.

Mr. Henry, who appeared for the plaintiff, contended that there is an equitable right to a freehold by reason of the covenant to renew, and that this equitable estate in freehold remained so

long as the equitable right to a renewal was in existence, and he relied on the fact that there was no fine to be paid on renewal, and no period mentioned in the covenant within which the renewal was to be obtained.

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v.
STENSON.

Mr. Carson, on behalf of the defendant, says that, notwithstanding the fact that there was no time limit within which the renewal was to be obtained, it was the duty of the lessee within a reasonable time after the death of the respective lives in the leases to renew, that consequently thenceforth the lands were held for the residues of the terms of years mentioned in the leases, the purpose of the term of ninety-nine years being to protect the tenancy; and that, no renewal having been obtained within a reasonable time after the fall of the first life, the deceased's right to a renewal was gone, and that he must be deemed to have waived this right.

It is quite plain that this case is not within the Tenantry Act, either under its terms or its equity. The Tenantry Act gives relief only to tenants who hold under leases containing covenants for perpetual renewal, and this lease is only renewable for lives nominated during a term of ninety-nine years.

The Vice-Chancellor in *Hussey v Domville* (1) held that the Tenantry Act had not received its strict construction, nor had it been restricted to cases within its letter; that, being a remedial Act, it had been acted upon in cases within the equity of it, that is, cases where a similar injustice exists to which a similar equitable consideration should, in order to prevent a like wrong, be afforded by a Court of equity. But the Court of Appeal did not take this view, which is disposed of by the language of Lord Justice FitzGibbon in his judgment, where, having discussed the objects, intent, and purport of that Act, he says that "the uniform course of decision both before and since the Act has limited this so-called 'equity' to cases in which the demise proves an intention that the tenure shall be perpetual. . . . The equity to relief in the cases of leases for years perpetually renewable, and of leases perpetually renewable on a peppercorn fine, is really the same as that which the Act validates, and the Vice-Chancellor

(1) [1900] 1 I. R. 417.

Powell J. may even have been justified in *M'Dermott v. Caldwell* (1) in
 1920. regarding a thousand years as in the sight of equity equal to
M'DONNELL eternity." Mr. Henry relied upon the decision in the case of
v. *M'Dermott v. Caldwell* (1), but it is quite plain that it cannot affect
STENSON. the decision in this case, because ninety-nine years is certainly not
 equal to eternity. FitzGibbon L.J. proceeds: "But no case until
 this has given relief where the intent that the tenure shall be
 perpetual does not exist. The English authorities and the general
 principles and equity alike prescribe that specific performance can
 only be enforced upon the terms of the contract, and that a party
 who has not observed it on his side cannot be relieved from the
 contractual consequence of his own mere neglect." And further
 on he says: "There is no trace of authority for the extension
 of the statutory relief to a case where the right of renewal is
 limited to a term of years. In such cases the intention that the
 tenure shall continue is absent. The tenure is to terminate
 whenever the period fixed by the contract runs out. It is
 impossible to contend that time is not of the essence of the
 stipulation fixing the time for nominating fresh lives."

If the tenant could wait for twenty years, he could wait until
 the period fixed by the lease was running to a close; the intention, to
 borrow a metaphor from the cases, being that the tenure should
 last only while a triple set of candles, each replaced immediately
 as it burned down, or was blown out, during a limited time,
 might continue to burn; the chance of its duration would be
 immeasurably increased if three fresh candles could be lighted all
 at once at the last minute.

The covenants in the present case are not covenants similar in
 terms to the covenant in *Hussey v. Domville* (2). The term of the
 lease in that case was to hold the lands unto the lessee, his heirs
 and assigns, for certain lives therein mentioned, and for the lives
 of the survivors and survivor of them, and for and during the
 lives and life of all and every such other persons and person
 as by virtue of the covenant for renewal thereafter contained
 should from time to time successively be added thereto during
 the term of years in the said covenant mentioned; and the
 covenant by the lessor was that upon the death of the lives or

1) 1 R. 10 Eq. 504.

(2) [1900] 1 I. R. 417.

life in the lease, or any of them, which should first happen within the term of seventy years, to be computed from the 1st May, 1823, the lessee paying to the lessor the sum of 5*s.*, and upon the nomination of the life of any other person within six months next after the death of such person or persons as aforesaid by the lessee, his heirs or assigns, at his or their own request to be put and inserted in the place and stead of the persons so happening to die, which life so added and inserted was to be endorsed on the said lease, or to be written in a deed, label, or parchment to be affixed to the said lease, or in a separate deed or writing, declaring the life so failing, and the life so to be added in lieu thereof, and the three lives in being during which the said estate should be then to continue, and in like manner from time to time successively thereafter during the term of seventy years upon the failure of every other life in the said lease, then nominated and thereafter to be successively nominated, and upon the like nomination of any other life successively in lieu of every several life so failing, then the lessor upon the demand of the lessee upon the like payment of 5*s.* for the fall of every such life at the time of such demand to be made as aforesaid would successively thereafter during the term aforesaid add and insert to the term of the lease the several life or lives of the several person or persons so successively nominated in place of the several person or persons so successively happening to die as aforesaid, which several lives so to be added should be endorsed on the lease or written in the manner therein mentioned.

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In the present case it was the lessor who contracted to nominate the lives, and the lease is for the life and lives of the persons named in the leases, and for and during the life and lives of such other person and persons as by virtue of the clause for renewal might be added thereto, or for and during the time, term, and space of ninety-nine years, to commence on, and be computed from, the 1st May last past, whichever of the said lives or years shall continue the longest.

The first life in the lease of the 1st February, 1832, dropped fifty-six years ago; another life in the same lease dropped fifty-five years ago, and the remaining life in the same lease dropped twenty-six years ago. In the lease of the 28th August, 1855,

Powell J. a life dropped forty-nine years ago; another life in the same
1920. lease dropped twenty-six years ago, and the last life dropped
M'DONNELL four years age.

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I consider that I am in this case bound by the decision of the Court of Appeal in *Allen v. Murphy* (1). No doubt in that case a renewal of the lease had actually been granted to the lessee by the tenant for life; but Lord Justice Ronan's judgment seems to lay down the principles which bind me in the present case. At p. 491 he says: "Where no time is fixed by the lease for applying for the renewal, where no notice has been served by the landlord calling upon the tenant to elect whether he will ask for a renewal or not, and where everything has gone on as if a renewal had been taken out, the reasonable presumption is that the parties had agreed to let the technicality of renewal lie over, and that neither party had any intention of raising any question as to the forfeiture of the tenant's rights." In the present case there is no time fixed by the lease for applying for the renewal, no notice has been served by the landlord calling on the tenant to elect whether he will ask for a new life to be nominated, there is no renewal fine to be paid, and nothing to cause any loss to the lessor.

I think it is difficult to distinguish the present case from the case under review, and I feel bound to apply the decision to the present case and to follow it, and to hold that delay in the case, although a very prolonged one, has not disentitled the lessee to have lives nominated by the lessor in the place of the lives which have dropped, and that there is therefore an equitable freehold in the lands comprised in the leases.

Solicitor for the plaintiff: *S. G. Rutherford.*

Solicitor for the defendant: *A. V. Thornton.*

M. G. B.

IN RE MECREDY AND THE SOLICITORS' REMUNERATION ACT, 1881.

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Feb. 17.

Solicitor—Bill of costs—Conveyance in consideration of rent and fine—Costs of deducing grantor's title—Scale fee—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—General Order, 1884, Schedule I, Part II, rule 5.

Solicitors acting for a lessor having prepared a lease in perpetuity at a rent of £200 per annum, and in consideration of a fine of £2900, and having also supplied abstract of the lessor's title and documents to vouch, furnished to the lessee a bill of costs claiming the scale fees as calculated by Schedule I, Part II, and rule 5, and, in addition, the costs of preparing Abstract of Title and copies of documents to vouch same under Schedule II, General Orders, 1884.

Held (affirming the decision of the Taxing Master), that the remuneration provided by rule 5 for the case of a lease in consideration of a fine only covers the charge "for preparing, settling, and completing conveyance and duplicate or lease and counterpart," and that the reference in the rule to Part I of the schedule (which deals with costs in the case of sales) is only for the purpose of ascertaining the amount of the remuneration by reference to the amount of the fine.

In re Robson (45 Ch. D. 71) and *Ex parte Connolly* ([1900] 1 I. R. 1) considered and applied.

MOTION TO REVIEW TAXATION.

Mr. G. H. Lennon having agreed with Dr. E. E. Lennon to grant to him a lease in perpetuity of certain lands at a yearly rent of £200, and in consideration of a fine of £2900, his solicitors, Messrs. T. T. Mecredy & Son, prepared the conveyance, and, at the request of the lessee, furnished an abstract of the lessor's title and documents to vouch same. Their bill of costs furnished to the lessee comprised—1, the scale fee authorized by Schedule I, Part II, of the General Order under the Solicitors' Remuneration Act, 1881, on the amount of the rent; 2, the scale fee under rule 5 of Schedule I, Part II, on the amount of the fine; 3, the costs of furnishing Abstract of Title and documents to vouch under Schedule II. The bill was referred for taxation, and the Taxing Master held that under the provisions of Schedule I, Part II, the lessor's solicitors were not bound to furnish and

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vouch an Abstract of Title, and that as the scale of charges contained in that schedule did not include remuneration for this work, the solicitors were entitled to be paid for it in accordance with the charges set out in Schedule II. The lessee appealed.

MacLoone K.C. (*Hubert Hamilton* with him), for the appellant:—

Dr. E. E. Lennon is really a purchaser, and his liability is covered by the scale fee. If this had been a case of a sale outright, all the work for which an extra charge is made here would have been covered by the scale fee under Schedule I, Part I. The Taxing Master relied on *In re Robson* (1), but that case only decides that where a lease is granted partly in consideration of a fine the lessor's solicitor is entitled to the scale fee even though he was not asked to furnish an Abstract of Title; it does not decide that, if an abstract had been asked for and furnished, a further fee, over and above the scale fee, would have been payable to him.

L. R. Lipsett (*Wylie K.C.* with him), for Messrs. T. T. Meeredy & Son:—

Schedule I, Part II, only deals with the costs of "preparing, settling, and completing the conveyance." The case is concluded by the decisions in *In re Robson* (1) and *Ex parte Connolly* (2).

Hamilton, in reply.

O'CONNOR M.R.:—

I have no doubt at all as to what my decision should be. The facts of the case are simple: Dr. E. E. Lennon agreed to take from Mr. G. H. Lennon the lands of Newcastle, in the county of Meath, at a perpetual rent of £200 a year, and in consideration of a fine of £2900. Messrs. T. T. Meeredy & Son were the solicitors for the owner, and the agreement between the parties being as I have stated, they wrote to Mr. Lane Joynt, the grantee's solicitor, on the 2nd April in the following terms:—"Dear Sir—We have recently been in communication with Mr. G. H. Lennon relative to a proposed transaction between him

(1) 45 Ch. D. 71.

(2) [1900] 1 I. R. 1.

and his brother, Dr. Lennon, for whom you act. The matter, as we understand it, is as follows : Our client is to give your client a perpetuity grant of certain lands adjoining his property at a rent of £200 per annum and a fine of £2900. The lands so proposed to be dealt with form portion of a large area of land, subject to a head rent of £84 odd a year, and to a life annuity payable to a Miss Metcalfe. The lands to be granted to your client will be indemnified against the head rent and annuity. By arrangement between Mr. G. H. Lennon and Miss Metcalfe, the fine is to be invested in their joint names. Your client will, of course, be liable for our costs incidental to the perpetuity grant. On hearing from you we shall proceed to put the draft grant in hands, and would like to know if you require an abstract of title, and, if you do, will you require documents to vouch. The title was very fully gone into by Mr. George Price on behalf of Miss Metcalfe, and was also gone into when the arrangement between Miss Metcalfe and Mr. Lennon was entered into."

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That letter indicates that the deed will not be of a very simple character, because it shows that the land, the subject-matter of the contract, is part of a larger area, subject to a head rent, and that it is also subject to a life annuity, and that both head rent and annuity are to be provided for, so that the costs incidental to the perpetuity grant would be the costs of a conveyance out of the usual form, and caused by the necessity of indemnifying the lands against common charges and procuring the concurrence of the annuitant. I cannot describe the costs of deducing title otherwise than as costs incidental to the preparation of the grant; and the grantor's solicitors suggested that these costs might be avoided, having regard to the fact that the title had already been examined. I would have come to the conclusion that that letter conveyed to the recipient Messrs. T. T. Mecredy & Son's intention to charge the grantee all the costs, not only of the preparation of the deed, but also of the deduction of title, if he required title to be deduced. It is plain, however, that Mr. Lane Joynt did not put the same interpretation on it, because on the 29th April he writes : "Excuse my not answering yours, but I was waiting to see my client, which I only did to-day. He agrees to the payment of your costs of the lease for ever and to the rent running from 25th March. Your

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client must, of course, make a good marketable title, and I shall be obliged if you will send me the abstract and documents to vouch. Possibly you may be able to help by lending me the opinion of counsel you refer to." Be this as it may, in my opinion it is not now open to the grantee to make the case that he is not liable to the costs of deducing and vouching title, having regard to the fact that the requisition to tax, signed by him, required the 'Taxing Master to tax these very costs. The terms of the requisition amount to a clear admission of liability.

Solicitors' costs are regulated by the General Order under the Solicitors' Remuneration Act, 1881, which lays down scales of remuneration for different classes of work, one of which (Schedule I, Part II) is for "conveyances in fee or for any other freehold estate, reserving rent (not being a fee-farm grant under the Renewable Leasehold Conversion Act or the Church Temporalities Act)," &c. That is exactly this case; and according to that scale the solicitor's costs "for preparing, settling, and completing conveyance and duplicate, or lease and counterpart," are to be calculated according to the amount of the annual rent. In the present case the grant was made partly in consideration of a fine. There is no provision made in the scale itself for fixing the remuneration where part of the consideration for the conveyance or lease is a fine; but rule 5 of the rules controlling the scale provides that "where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium." Now, it is to be remembered that this is a rule applicable to Schedule I, Part II, which provides the scale of remuneration merely "for preparing, settling, and completing the conveyance and duplicate," and makes no provision for the costs of negotiation or deducing title, so that the object of rule 5 must necessarily have been to provide a scale for estimating the remuneration "for preparing, settling, and completing the conveyance" in cases where there is a fine, over and above the amount fixed by the scale, which is controlled by the amount of the rent. It is true that the amount of such extra remuneration can only

be ascertained by going back to the scale in Part I of Schedule I, which covers the costs not merely of perusing and completing the conveyance, but also of negotiations, preparation of contract and conditions of sale, deducing title and furnishing necessary searches, but the reference to Part I is plainly for the purpose of arriving at the amount of remuneration only. In the present case the grantor's solicitors have charged the scale fees according to Part II based on the rent, and under rule 5 on the amount of the fine, and in addition they have charged for the costs of deducing and vouching the grantor's title under the old system as modified by Schedule II, and the question I have to decide is whether they are entitled to more than the scale fees. In my opinion the scale fees cover only the charges "for preparing, settling, and completing conveyance and duplicate, or lease and counterpart," and if the claimants have done more than this they should be paid for it. Rule 1 of the "rules applicable to Part II of Schedule I as to all leases or conveyances at a rent" provides that "where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the present system as altered by Schedule II." The reason for this rule is that Part I of the schedule is not conversant with the costs of deducing title.

Apart from authority, I should have come to the same conclusion, but in my opinion the question is closed by authority. In *In re Robson* (1), North J. says at p. 75: "The case falls exactly within rule 5 of Part II of the schedule—viz., the lease is partly in consideration of a rent and partly of a money payment or premium. That rule provides that 'in addition to the remuneration hereby prescribed in respect of rent there shall be paid,' not a bill of costs, but 'a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.' It does not say that the vendor's or lessor's solicitor is to be remunerated as if, to this extent, the transaction was a purchase; but that he is to be remunerated in the case of a lease or conveyance reserving rent by a sum equal to the remuneration on a purchase—a sum to be ascertained by reference to something else in the rules." Further on he says (p. 76): "But it is said that, as the scale fee on a purchase (or sale) is not payable unless

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the title is deduced as well as the conveyance completed (see *In re Lacey & Son* (1); *Newbould v. Bailward* (2)); so it cannot be allowed on a lease when the business is completed without deducting title. But it is clear that the two cases are not assimilated for all purposes. . . . Again, the law is established that a lessee is not, in the absence of express contract to that effect, entitled to call for his lessor's title, and such title notoriously is scarcely ever required, and it would be rather absurd, I think, to hold that the reference in rule 5 to remuneration in respect of the premium has relation only to the very rare cases of leases in which the lessor has by special contract to deduce his title." The matter is set completely at rest by the decision of the Court of Appeal in *Ex parte Connolly* (3), where Holmes L.J. says in reference to rule 5 (at page 5):—"But the work for which remuneration is being provided is for preparing, settling, and completing a lease or fee-farm grant and the counterpart thereof, and the additional sum he is to receive is not for additional work, but a sum to which he would have been entitled if he had done different work, which, *ex hypothesi*, he has not done."

It is plain that additional remuneration was to be given for the work of preparing an abstract of title. For these reasons I affirm the decision of the Taxing Master, and dismiss the motion with costs.

Solicitor for the applicant: *A. Lane Joynt*.

Solicitors for the claimants: *T. T. Mecredy & Sons*.

A. H. W.

(1) 25 Ch. D. 301. (2) 14 App. Cas. 1. (3) [1900] 1 I. R. 1.

KIERNAN v. M'CANN.
(1917. No. 1059.)

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Jan. 14.
Feb. 10.

Constructive trust—Graft—Yearly tenancy—Lease taken by one next-of-kin.

C. M. the elder, a tenant from year to year of lands situate in County Meath, died intestate in the year 1864. His widow and children remained living on the lands as tenants in common, no administration having been taken out. On the 10th November, 1873, a lease of the lands was made to John, the eldest surviving son, and he subsequently signed a purchase agreement under the Land Purchase Acts. In October, 1905, the lands were vested in him as owner, subject to equities. By a deed dated February 11th, 1905, John assigned the farm to his brother Charles the younger, and died intestate. In the year 1911 C. M. the younger devised the lands to the defendant. His sisters E. and C. continued to reside on the farm, and in a suit to administer the estate of C. M. the younger, they claimed to be entitled to an undivided two-thirds of the lands.

Held, that John took the lease as trustee for the family, and that it was a graft on the previously existing interest.

This was a creditor's suit for the administration of the estate of Charles Mathews the younger, of Turkstown, Kells, County Meath, who died on the 18th February, 1916, and the defendant was sued as executor of the will.

The lands were originally held by Charles Mathews the elder as tenant from year to year. He died in the year 1864 intestate, leaving him surviving his widow and ten children. No administration was taken out, and the family continued to live together on the farm. As years went on, some of the daughters got married and left the homestead, getting fortunes. Others emigrated, and presumably got fortunes. There then remained on the farm four sons and two daughters. The four sons lived and died on the farm. Charles the younger, whose estate is being administered, was the survivor of the sons. The two daughters who remained on are still living. They are Catherine and Elizabeth, who now claim undivided shares in the farm. The mother died many years ago intestate, and her one-third share devolved equally upon the children. The claims of the daughters who left the home were either released for good consideration, or became barred by time.

<i>M. R.</i> 1920. KIERNAN <i>v.</i> M'CANN.	In this way the farm came to belong in the year 1873 to Patrick, John, James, Charles, Catherine, and Elizabeth in equal shares. Patrick, the eldest son, died intestate in the year 1873, leaving John, the next eldest, James, Charles, Catherine, and Elizabeth in possession of the farm. Each was then entitled to an undivided fifth share.
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On the 10th November, 1873, a lease of the farm was made to John alone. He subsequently signed a purchase agreement under the Land Purchase Acts, and on the 17th October, 1905, he was registered in the Local Registration of Title Office as owner in fee-simple, subject to equities, and by deed dated 11th February, 1905, John assigned all his interest in the lands to Charles Mathews the younger, "with a covenant to pay to Elizabeth Mathews and Catherine Mathews respectively, on the date of their departing from said dwelling-house and lands, the sum of £80, and the said Elizabeth Mathews and Catherine Mathews covenant with the said Charles Mathews that they will on receipt of the said sum of £80 release whatever claim, share, title, or demand they or each of them now has or may hereafter have or become entitled to and deliver up quiet and peaceful possession of said lands and premises." John died intestate, and Charles the younger and Catherine and Elizabeth continued to reside on the farm as formerly. By his will dated the 18th August, 1915, Charles the younger appointed Charles M'Cann his executor, and devised the farm to him absolutely.

J. M. Whittaker K.C. (with him *Murnaghan*), for the plaintiff.

Herbert Wilson K.C. (with him *Noonan*), for the defendant:—

Charles M'Cann is the rightful owner of the lands as devisee of Charles Mathews the younger. John, who was a tenant in common, took the lease of 1873 in his own name, and then assigned to Charles the younger. This lease could not be a graft on the tenancy from year to year. The doctrine of graft has gone too far in this country. John was a tenant in common, and tenants in common do not stand in any fiduciary relation to each other. This is distinctly laid down in *Kennedy v. De Trafford* (1). In *Biss v. Biss* (2) Romer L.J. lays down the principle of the

(1) [1897] A. C. 180.

(2) [1903] 2 Ch. 40.

doctrine of graft when he says, at p. 61: "A person renewing is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position, and owed by virtue of that position a duty towards the other persons interested." John was in no such position, and the fact that the rest of the family agreed makes this clear.

He also referred to *Dempsey v. Ward* (1); *Quinton v. Firth* (2); *Ex parte Grace* (3).

M'Gonigal K.C., for the Misses Mathews:—

John got this lease, not for himself at all, but for the benefit of the rest of the family, and the previously existing rights were not disturbed. In every case where graft is rejected it is purely a question of fact whether the lessee takes for himself or for others. Here the yearly tenancy was only surrendered in order to obtain a new lease. Further, *Romer L.J.* states in *Biss v. Biss* (4) at p. 61: "If a person has obtained a new lease by reason and in consideration of a surrender or attempted surrender of an old lease or rights belonging to third parties, he cannot as against those third parties pretend to hold the new lease as his own absolute property"; all the parties must join in order to surrender the old tenancy: *Hill v. Hill* (5).

O'CONNOR M.R.:—

[His Honor having stated the facts as set out above, proceeded as follows:—]

Nothing is known of the negotiations which led up to the lease, nor is there any direct evidence of any family arrangement under which John became the sole lessee. All we do know is that there was no disturbance in the family life—that, as they did before the lease was made, they continued to live together in the homestead. It becomes then a matter of presumption what was the arrangement under which the lease was made to John. At that time there was a yearly tenancy in the lands, on which the remaining members of the family had equal claims. John has no greater right to it than any of the others. He could not have

(1) [1899] 1 I. R. 463.

(2) 1 I. R. 2 Eq. 396.

(5) 1 I. R. 8 Eq. 140.

(3) 1 Bos. & P. 376.

(4) [1903] 2 Ch. 61.

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surrendered it without their concurrence. The operation of the lease taken by John with the acquiescence of the others effected a surrender, and we have to consider what were the terms on which the acquiescence was given. In the absence of other evidence, we have to take the probabilities and the subsequent conduct. It is highly improbable that the younger members of the family absolutely gave up their rights, thus rendering themselves completely dependent on their eldest brother. On the other hand, their continued residence on the farm is evidence that their claims remained as they were before the lease. These considerations by themselves seem to me to afford ample evidence of a family arrangement that the lease was to be taken merely for the purpose of getting security of tenure for the family, and not for the purpose of altering their rights inter se. But there is more evidence in this direction. James died in 1893 intestate and unmarried. The survivors continued to live together on the farm, and on the 11th February, 1905, John executed a deed by which he assigned the farm to Charles. At law he was entitled to do this, as he was the lessee; but it contains evidence that John recognized that Catherine and Elizabeth had claims on the farm, because there was a covenant by Charles to pay to each of them the sum of £80 on the date of their departure from the dwellinghouse, and although they are not made parties to the deed, and never executed it, there is expressed therein a covenant by them that they will on receipt of the £80 each release whatever claim, share, title, or demand they or each of them may have. This deed recognized their right to remain in the dwellinghouse, which I can only attribute to ownership of the lands, derived as next-of-kin of their father and mother and brothers who had died.

The case is then one of a trusteeship arising, not from the mere circumstance of a person taking a lease in a fiduciary capacity, but taking it under circumstances which prove a family arrangement, afterwards recognized under the hand of the lessee.

Solicitors for the plaintiff: *Murphy & Mooney.*

Solicitor for the defendant: *Thomas Tiernan.*

Solicitor for the Misses Mathews: *J. J. Lynch.*

HAYES' ESTATE.

*Joint tenancy—Severance.**Land Com.
Wylie J.
1920.
Feb. 17, 24.*

An agreement for sale entered into by all joint tenants operates as a severance of the joint tenancy.

OBJECTION TO FINAL SCHEDULE OF INCUMBRANCES.

The facts, in so far as they are material to the present report, are as follows :—

Upon the death of Sir Edmund Samuel Hayes, in 1860, his nine daughters became entitled under his will to the lands sold in this matter as joint tenants in fee in remainders after the determination of certain estates tail created by said will. The estates tail determined on the 27th January, 1912, upon the death of Sir Edmund Francis Hayes without male issue. In 1872 Mary Hayes, one of the daughters, married James Patterson, and by her marriage settlement conveyed to the trustees thereof, amongst other property, all real estate to which she was then entitled or which she might acquire during the marriage. Maria Hayes, another daughter, died in 1882, without having done any act to sever her interest as a joint tenant. Elizabeth Hayes, another daughter, died in 1899, also without severing her interest in the joint tenancy. In 1879 Emma Agnes Hayes, another daughter, married Colonel Woods, but her marriage settlement did not affect her interest as joint tenant. The other five daughters were alive and unmarried at the death of Sir Edmund Francis Hayes, on whose decease without issue male the remainder to the daughters fell into possession. Mrs. Patterson, the daughter who first married and severed her joint tenancy, died in 1879, leaving one child, now Mrs. Ballard, entitled to her one-ninth share. There were thus only six daughters living when the remainder fell into possession. Those six entered into an agreement with the Congested Districts Board in December, 1912, for the sale of the entire interest in the lands sold herein. They satisfied the Land Commission as to their *prima facie* right to sell, and the sale was

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carried out, the purchase-money advanced, and the entire lands vested in the Board. In the fuller investigation of the title for the purpose of the distribution of the purchase-money, Mrs. Patterson's settlement turned up, and Mrs. Ballard's right to her mother's one-ninth share appeared clear. Since the execution of the agreement for sale two of the vendors died, viz., Emily Hayes on the 11th December, 1915, and Alice Caroline Hayes on the 18th February, 1917. An objection to the final schedule raised a number of questions, of which only one required consideration, viz., whether an agreement by joint tenants for the sale of an estate to the Congested Districts Board operated as a severance of the joint tenancy?

E. S. Murphy K.C. and *Marnan*, for the objectors, Mrs. Emma Agnes Woods and Colonel Wm. Woods :—

Some definite act must be done in order to effect a severance; mere intention is not enough. We rely on *In re Wilks* (1). Nothing was done here that would necessarily involve severance. The joint owners merely carried out a pre-existing understanding, though there was no formal agreement. There is no authority for the proposition that a mere agreement to sell the whole would effect a severance, though undoubtedly a contract to sell a share would. Income to which persons are entitled as joint tenants is only severed as the income becomes payable: *Walmsley v. Foxhall* (2). *Kingsford v. Ball* (3) is cited in all the text-books as an authority for the proposition that a contract for sale by one joint tenant effects a severance. [They also referred to *Williams v. Hensman* (4) and *Leak v. MacDowall* (5).]

Walker K.C., for the vendors :—

The report of *Kingsford v. Ball* (3) is not satisfactory; the facts are not stated. But Lord St. Leonards cites it as an authority for the proposition that a contract for sale will sever a joint tenancy (Sugden on "Vendor and Purchaser," 14th ed., p. 698). If three or four joint tenants contract, each contracts

(1) [1891] 3 Ch. 59.

(2) 40 L. J. Ch. 28.

(3) 2 Giff. App. 1.

(4) 1 J. & H. 546.

(5) 32 Beav. 28.

separately quoad his share; the fact that the contracts are grouped in one agreement does not alter the legal effect. There is no ground for implying a continuance of the joint tenancy in the purchase-money. [He also referred to *Brown v. Raindle* (1).]

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Cur. adv. vult.

WYLLIE J. :—

Feb. 24.

[His Lordship, having stated the facts as above set out, proceeded as follows :—]

The objectors contend that eight-ninths of the estate was at the date of sale vested in the six vendors as joint tenants; that the sale did not sever their joint interest; that they continued joint tenants of the purchase-money, and that the four vendors now surviving are entitled to said eight-ninths. Now, it being admitted and well-settled law that an agreement for sale by one of the joint tenants of her share severs her joint tenancy, it would seem to me clear apart from authority that an agreement for sale by all the joint tenants would sever their joint tenancy. What can a joint tenant sell, whether he sells separately or joins with the others in a sale of the whole? Clearly only his own share. Supposing one, two, or three of four joint tenants sell the whole, what is the effect in law of the agreement? It is merely effective as a sale of the share or shares of the actual vendor or vendors, but it has the further effect of severing the joint tenancy in the share and shares sold from the shares or share unsold: *Connolly v. Connolly* (2). Therefore, it would seem to me that the agreement for sale in this case by the six joint tenants of the whole estate was only effective as to the eight-ninths held in joint tenancy, and was in substance and in law a sale by each of her share, and that the same rule as to severance applied to each share as applies where one sells his share separately. The only case to which I have been referred bearing directly upon this question is *Kingsford v. Bull* (3). The entire report of the case is merely a publication of the reporter's shorthand notes of the judgment of Lord St. Leonards dismissing an appeal from the Vice-Chancellor. It does not state the nature of the proceedings, who the parties were, or the questions raised on the appeal, and the report is very

(1) 3 Ves. 256. (2) 17 Ir. Ch. R. 208, 223. (3) 2 Gifford, Appendix 1.

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hard to understand; but one thing, I think, I can gather for certain from the report, and that is: that the result of the appeal depended upon the question whether a contract for sale by a father and son, who were joint tenants in fee, to a third party severed the joint tenancy. I think it is equally clear that Lord St. Leonards held that it did, and in his book on "Vendors and Purchasers" he treats the case as so deciding. Dart, in his treatise on the same subject, takes the same view. Therefore, both on principle and authority, I hold that the contract for sale in this case entered into by the vendors severed their joint tenancy. This is, I think, in accordance with the view and intention of the parties, because in their joint and several power of attorney they authorize their agent, Col. Baillie, to receive and give effectual discharges for all interest payable on the purchase-money "from the time it commences to run down to the allocation of the stock." This, I think, contemplates a future division of the stock amongst the six vendors. But of course this inference as to the intention of the parties is entirely outside my view of the law as to the effect of the contract of sale in severing the joint tenancy.

Solicitors for the objectors: *Wm. Findlater & Co.*

Solicitors for the vendors: *M^r Mahon & Tweedy.*

T. C. T.

CLARK v. WORKMAN.

Ross J.
1919.

Company—Transfer of controlling interest—Directors trustees for shareholders—Casting vote of chairman illegally appointed—Internal management.

Dec. 9, 10,
11, 16.

The directors of a company must act strictly as trustees in carrying through transfers of shares, unfettered by any undertaking or promise to any intending purchaser.

An appointment of a chairman of directors made in contravention of the articles of association is void, and is not regularized by mere acquiescence, and consequently resolutions carried by the casting vote of such a chairman are inoperative.

The transfer of a controlling interest in a company is not a matter of mere internal management. It may involve a complete transformation of the company and consequently such a transfer may in a proper case be restrained.

MOTION FOR AN INJUNCTION.

The firm of Workman, Clark, & Co. was incorporated in 1880 under the Companies Acts, the capital of the company being £30,000, divided into 1200 shares of £25 each. The company was in the hands of two families, the Workmans and the Clarks, and the liquid assets in the company's hands amounted to £1,800,000. Early in the year 1919 there appears to have been some discussion among the directors about the reconstruction of the company. It then seems to have been suggested that the entire business of the company might be sold. Negotiations took place between the defendant, Mr. Frank Workman, and his nephew, Mr. Alfred Workman, who was the leading man in the syndicate that had purchased the Northumberland Shipbuilding Company, William Doxford & Sons, a controlling interest in the Fairfield Shipbuilding Company, and other undertakings. The syndicate offered to purchase 80 per cent. of the shares at ten times their par value. This offer was discussed by Sir George Clark and the other directors, and it was agreed that a meeting should be held, and the offer put before them. The meeting was held on the 3rd of

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July, and Sir George Clark then said he would not sell any of his shares, which made the acceptance of the offer impossible. He then offered to buy out all the shareholders who would sell to him at nine and a half times the par value of their shares. The others agreed to accept these terms, but at a subsequent meeting of the directors Sir George Clark explained that he would not proceed with his offer, inasmuch as he had been in error because the figures before him that had been supplied to Mr. Alfred Workman were gross and not net; that is to say, that the commission on profits payable to the managing directors and staff had not been deducted. Thereupon Mr. Frank Workman re-opened negotiations with Mr. Alfred Workman, and these resulted in a draft agreement with the Northumberland Ship-building Company and William Doxford, Ltd. This was at the end of August or beginning of September put before the plaintiff, Mr. Robert W. Smith, by the defendants Frank Workman and Charles E. Allen. Mr. Smith strongly objected to certain important clauses in the draft agreement, the effect of which would have been to give control of the Belfast company to the syndicate, and refused to sell his shares under such conditions. Sir George Clark also refused, and instead submitted a scheme of reorganization; but this was not approved of by Mr. Frank Workman and Mr. Allen, and consequently it fell through.

Mr. Frank Workman then decided to renew negotiations with the syndicate. Before he went to London for this purpose a meeting was held at the office of Messrs. M'Lean & Sons, solicitors, Belfast. It was then suggested that Sir George Clark should purchase the shares of the majority at nine and a quarter times their par value, or should sell at nine and a half times their par value the shares of himself and the shareholders associated with him. These suggestions were rejected by Sir George Clark. Mr. Frank Workman then proceeded to London and obtained from the syndicate an offer of £77 16s. 8d. in the new denomination of shares, or £233 10s. in the old denomination, being a little more than nine and one-third times the par value. A meeting of the directors was summoned for the 26th November. On the 22nd November, Sir George Clark asked the secretary of the company what was the business of the meeting, and he said he did not

know. He then went with the secretary to the defendant, Frank Workman, and asked him, but he refused to give any information. The plaintiffs say that they suspected that an offer from the syndicate was intended to be rushed through at the meeting.

To understand what took place at the meeting it is necessary to go back to a general meeting of the company held on the 21st March, 1881, when the following resolution was passed:—"That Mr. John Workman and Mr. Charles Workman be re-elected directors for the ensuing year, and Mr. Frank Workman be elected chairman." From that time Mr. Frank Workman acted as chairman without objection on the part of the other directors.

The meeting of 26th November, 1919, was attended by all the eight directors. From the minutes of that meeting it appeared that a series of resolutions dealing with the proposed change in the company, and in particular a resolution dealing with the transfer of a controlling interest to the English syndicate, were carried by the casting vote of the chairman, Mr. Frank Workman, in spite of the opposition of the plaintiff in every case, whereupon the present proceedings were instituted.

S. L. Brown K.C. and *Herbert Wilson K.C.* (*J. A. Pringle* with them), for the plaintiffs:—

This motion claims an injunction in three parts—at present we do not ask for an injunction in terms of No. 2. No. 3 is a technical matter; the articles give the directors power to elect their chairman. The defendants do not allege any appointment of Mr. F. Workman by the directors, but only by a meeting of shareholders. Powers given by the articles to the directors cannot be exercised by the shareholders. The alleged resolutions of 26th November were never carried.

As to the other ground, a director in exercising the duties of a director is a trustee for the company, and must go to a directors' meeting with a free mind and unbound: *Bennett's Case* (1). That was the duty owed by the directors to the company and the shareholders in approving their purchases. This duty the defendants were unable to perform by reason of the bargain they had entered into with the Northumberland Company or their chairman. Certainly Frank Workman could not.

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(1) 5 De G. M. & G. 284.

Ross J. [They referred to Halsbury, vol. 5, § 360; *Salmon v. Quin &*
 1919. *Axtens, Ltd.* (1); *Gramophone & Typewriter Co., Ltd., v. Stanley* (2);
CLARK *Punt v. Symons & Co., Ltd.* (3); *Hindle v. John Cotton, Ltd.* (4);
v. *Fraser v. Whalley* (5); *Allen v. Gold Reefs of West Africa* (6).]
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The Solicitor-General and J. M. Whitaker K.C. (Andrews K.C. and J. H. Robb with them):—

This action is wrongly constituted. We have the majority of shareholders, and the plaintiffs sue on behalf of themselves only.

[*Brown K.C.* applied for liberty to amend, which was granted.]

Frank Workman was elected chairman at a meeting when only directors were present, and has acted as such for thirty-eight years. The plaintiffs cannot now dispute his position.

This action concerns a dispute between two groups of directors as to a matter of business policy of the company. We have a majority of shareholders, and by duly summoned shareholders' meeting can remove all the plaintiffs except Sir G. Clark, and so, having a majority on the Board, can carry through our policy. The Court will not interfere by an injunction in such a case: *Foss v. Harbottle* (7); *MacDougall v. Gardiner* (8). A director, though interested, may assent to a transfer: *In re Copal Varnish Co.* (9). The vice of this action is that the minority seek to govern the majority in a matter of policy: *Burland v. Earle* (10); *Grant v. United Kingdom Switchback Co.* (11). What was done by the directors here was voidable only and not void, and we have a majority of shareholders sufficient to ratify it and remedy any irregularity: *Harben v. Phillips* (12); *North-West Transportation Co. v. Beatty* (13). *Fraser v. Whalley* (5) and *Allan v. Gold Reefs of West Africa* (6) are both in our favour, as the principle of both cases is that the majority must rule. *Hindle v. John Cotton, Ltd.* (4), was a case of personal wrong. No personal wrong has been done here; there cannot be a personal wrong if the act is one which may be done under the articles.

(1) [1909] 1 Ch. 311.

(2) [1908] 2 K. B. 89.

(3) [1903] 2 Ch. 506.

(4) Scottish Law Reporter, 630.

(5) 2 H. & M. 10.

(6) [1900] 1 Ch. 656.

(7) 2 Hare, 461.

(8) 1 Ch. D. 13.

(9) [1917] 2 Ch. 349.

(10) [1902] A. C. 83.

(11) 40 Ch. D. 135.

(12) 23 Ch. D. 14.

H. Wilson K.C., in reply :—

The question here is not a matter of internal policy, but of a breach of trust by the defendant directors. A general meeting cannot, except by altering the articles, take away the powers given to the directors by the articles, and we have the support of sufficient shareholders to prevent alteration of articles.

Cur. adv. vult.

Ross J. :—

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Dec. 16.

[Having stated the facts, as above set out, his Lordship proceeded as follows :—]

Prior to the meeting of 26th November, 1919, there had been no less than five attempts to deal with the matter, either by reconstruction or by the sale of all or portion of the shares of the company. No unfriendly attempt had been made to prevent Sir George Clark from purchasing. Everybody was willing to accept his offer until he withdrew it, on discovering that it had been made in error. But all this could not get rid of the fiduciary obligations incumbent on every director when he attended that all-important meeting on 26th November. They were bound to consider the interests of all the shareholders, unfettered by any undertaking or promise to any intending purchaser. They were bound to consider all offers, by whomsoever made, and they were bound to weigh and consider the desirability of admitting the persons or companies who proposed to come into their concern. If they failed in any of these matters, they disabled themselves from performing their duty to the shareholders, and nothing that they did would in the eye of the law be held to have been done in good faith.

[His Lordship then read the minutes of the meeting of 26th November, 1919.]

The notice of motion now before me is for an interlocutory injunction until the hearing of the action or until further order restraining the defendant directors in respect of three matters :— First, from approving of or voting in favour of a resolution approving of any sale or sales or transfers of shares of the company, submitted under Article 139 of the Company's Articles of Association, to any person or persons or body corporate without complying with the provisions of the said Article 139 (2).

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The second matter in respect of which an injunction is required I pass over, as it is not pressed for the present.

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The third is that the defendant company and the named defendants be restrained from acting on the resolution of the directors passed at a meeting of the directors on 26th November, 1919, which resolution purports to have been carried by the casting vote of the defendant, Frank Workman.

I have granted an application of the plaintiffs that they be at liberty to amend the writ of summons by a statement that they are suing on behalf of themselves and other shareholders of the company associated with them.

There is no real controversy, as I have said, as to the facts, but there is much as to the proper inferences to be derived from these facts. There is no real controversy between the parties as to the legal principles, but there is much as to the application of these principles to the facts of the case.

We must first consider what is the position of a shareholder in this and similar companies. He does not hold his property simply at the mercy of the majority. His rights are carefully guarded, and his chief protection consists in the articles of association. Now, what do the articles of association amount to in point of law? They constitute a contract between every shareholder and all the others, and between the company itself and all the shareholders. It is a contract of the most sacred character, and it is on the faith of it that each shareholder advances his money (sect. 14 Companies Act, 1908): *Wood v. Odessa Waterworks* (1); see judgment of Farwell L.J. in *Salmon v. Quin* (2). Can this contract be altered or varied?

It can only be varied by a special resolution. A special resolution is defined by sect. 69 of the Act of 1908. It must first be passed as an extraordinary resolution, which requires a three-fourths majority of the shareholders at a general meeting, with notice of the extraordinary resolution. It must then be confirmed by a majority at a general meeting, held not earlier than fourteen days or later than a month after the first meeting, and there must be due notice of the special resolution.

It is therefore a matter of no small difficulty to alter the articles of association. In this case they cannot be altered, because

(1) 42 Ch. D. 636.

(2) [1909] 1 Ch. 311.

the plaintiffs control only 55 per cent. of the share capital, while the defendants control 45 per cent.

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Again, the company is what is known as a private company. This means, according to sect. 121 of the Companies Act, a company that by its articles—(a) restricts the right to transfer its shares; (b) limits the number of its members to fifty; (c) prohibits any invitation to the public to subscribe for debentures or shares.

On 16th April, 1908, this company passed resolutions forming itself into a statutory private company. This was carried into effect by articles 138–142. By article 138 the directors can refuse to sanction (inter alia) a transfer to any transferee not approved by them. They need give no reason for refusal, and their decision is final. Article 139 provides the formal procedure which must be gone through in effecting a transfer of shares. Shareholders must give notice in writing, to be left at the office of the company, of their desire to sell. The directors have then a month to look about for a desirable purchaser. If they find a purchaser within a month, the shareholder is obliged to sell to him. If they do not, the shareholder may after a month sell to a person found by himself, but even then the directors may refuse to register the transfer.

What is the intent and meaning of these provisions? There must be bona fides. There must be no indirect motives. The directors are to act strictly as trustees in the matter of the transfers: *Bennett's Case* (1).

In all cases bona fides is the test of the valid exercise of powers by trustees. An opportunity for deliberation in the full light of the facts and circumstances is impliedly required. I must say that I think it is hardly within the spirit of the articles that shareholders holding 55 per cent. of the shares should be allowed to declare their desire to sell at 12.30 o'clock, and that at 2.30 the chairman, who had previously refused to give any information, should disclose the names of the proposed transferees. We are not to forget the magnitude and importance of the proposed operation. It is a strong proposition to assert that a majority is to overbear and stifle a minority when the intention is to do such a serious thing as to give a controlling interest in one company to

(1) 5 De G. M. & G. 284.

Ross J. another company that is engaged in the same line of business,
 1919. and that may be to some extent a rival company. Article 70 pro-

CLARK hibits a person engaged in similar business from being a director
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WORKMAN. of this company, and excludes a director of a similar company.

When the test of bona fides comes to be applied, all these matters and the surrounding circumstances call for the most careful attention. I refer in this connexion to the weighty observations of Lord Lindley when Master of the Rolls in *Allen v. Gold Reefs Co. of West Africa* (1). Even the statutory powers of altering articles of association by a special resolution must be exercised subject to those general principles of law and equity which are applicable to all powers enabling majorities to bind minorities. They "must be exercised," says the learned Master of the Rolls, "not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and must not be exceeded. These conditions are always implied, and are seldom if ever expressed." These observations refer to the exercise of powers by shareholders. They apply with augmented force when the powers are being exercised by directors.

There is one other matter of law affecting the case, and it is this: the powers given to directors are powers delegated to the directors by the company, and when once given the company cannot interfere in the subject-matter of the delegation unless by special resolution: *Automatic Self-cleansing Filter Co. v. Cunningham* (2).

I have stated the principles of law applicable to this case, and I now proceed to apply them. The first question that arises is whether Frank Workman was lawfully chairman of the meeting of directors on the 26th November. If he were not, everything that was done was ultra vires and wholly inoperative.

The articles dealing with this matter are 91, 92, and 93. Article 91 provides that questions arising at any meeting of directors shall be decided by a majority of votes of those present, and in case of an equality of votes the chairman of the meeting shall have a casting vote. Article 92 provides that the directors may appoint a chairman and vice-chairman of their meetings, and determine the period for which he or they shall hold office. There you have the precise contract with the shareholders, and it is

(1) [1900] 1 Ch. 656, at p. 671.

(2) [1906] 2 Ch. 34.

essential that the chairman should be elected by the machinery provided by that contract, and in no other way. The power of electing a chairman having a casting vote is of vital importance. The power having been delegated by the company to the directors, cannot be controlled or affected by the company, unless the contract is altered by a special resolution, but no such special resolution was passed. Article 93 provides that all meetings shall be presided over by the chairman of the directors (if any) if present. This article contemplates the possibility of the elected chairman's death or the expiration of his period of office as fixed by Article 92. In that case the directors are to choose one of their number to preside.

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The defendant, Mr. Frank Workman, was never appointed by the directors a chairman of their meetings. The defendants say that the resolution passed at the general meeting of shareholders held on the 21st March, 1881, was sufficient:—"Mr. John Workman and Mr. Charles Workman be re-elected directors for the ensuing year, and Mr. Frank Workman be elected chairman." This is claimed to have the effect of conferring on Mr. Frank Workman the chairmanship, not for the ensuing year only, but for life or until removal.

But the election of a chairman of directors is not the function of a general meeting. It can elect directors, but not the chairman of the directors. The minute does not state who attended. It is thirty-eight years ago since the meeting was held. But even assuming that nobody attended, it is not a meeting of directors. It is a general meeting, and all attended as shareholders, and in no other capacity.

But it is contended that this is an irregularity that can be cured by acquiescence. The office of chairman becomes important in connexion with the power to give a casting vote. The question of a casting vote never became material, so far as we know, until the meeting of the 26th November, 1919. I am therefore of opinion that Mr. Frank Workman was not legally chairman at that meeting, and that the whole of the resolutions which were carried by his casting vote are inoperative, and of no effect. This decision is of merely transient importance, inasmuch as by Article 82 the number of directors may by a resolution at a general meeting be increased, provided the total number shall not exceed ten.

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Consequently a nominee of the defendants can be elected by the majority which the defendants possess.

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I now proceed to examine the more important questions, whether the matter was one of internal management, with which the Court cannot interfere, and whether the defendant directors were acting bona fide, with a view to the interests of the company as a whole. It has been pointed out by the Solicitor-General that they were not altogether abandoning the company. They are retaining twenty-five shares each, which is the amount that would qualify them to be elected directors. But when we come to figures, the importance of their remaining is comparatively small. In value they are selling £1,562,037 and retaining £7,783. Whence it appears that those directors who remain are more vitally interested in the success of the company than those who are departing.

The Solicitor-General and Mr. Whitaker contended that the Court has no jurisdiction to interfere in a question of internal management. That proposition cannot be disputed. The Court has no right to say how much is to be distributed in dividends, or how much is to be added to the reserve account; what contracts for material are to be accepted, what remuneration is to be paid to their employees, and such like. All these things must be dealt with by the directors, and no Court can interfere so long as they are acting within their powers.

But what was the nature of the contemplated operation as distinguished from its expediency? On the question of its expediency I am not called on to express any opinion whatever. I do not presume, with my limited knowledge of this particular kind of business, to express an opinion on which these most eminent men of business hold divided views. Great combinations of business establishments, banks, and railways are now deemed expedient by many. On the other hand, it was no doubt present to the minds of the plaintiffs that the fine quality of their work might be watered down by the introduction of these English firms. The owners of the great shipping lines, who had found it a true economy to get the best work and the best material, might no longer resort to the company if it ceased to produce ships of the highest quality, as in the past. Which was right and which

was wrong I am not called on to decide. But I am obliged to decide whether it was a question of mere management or otherwise, and I am distinctly of opinion that it was not. It was not a mere matter of the sale of shares. We must look at the contemplated results of the manifest intention of the parties. It was a matter involving a complete transformation of the company—a fundamental alteration of policy from a policy of isolation to a policy of co-operation with a great syndicate in England, about which very little was known in this country. This operation could in no sense be held to be mere management. Furthermore, if it turns out that there was a breach of trust, that could never be a matter of internal management.

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I must now consider the action of the defendant directors, their motives and intentions, and ascertain whether what they proposed and supported was, in the circumstances, inconsistent with a right performance of their fiduciary duty to the company. In the recent Scotch case of *Hindle and John Cotton, Ltd.* (1), Lord Eilay said: "Where the question is one of abuse of powers, the state of mind of those who acted, and the motive in which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials, which genuinely throw light upon that question of the state of mind of the directors, so as to show whether they were honestly acting in discharge of their powers in the interests of the company, or were acting from some by-motive, possibly of personal advantage, or for any other reason."

I now refer to two uncontradicted statements in the affidavits. Par. 14 of R. W. Smith's affidavit: "In my presence Frank Workman stated that he had promised the chairman of the Northumberland Shipbuilding Company, Ltd., that he would use his best endeavours to get the controlling interest in the defendant company into the hands of the chairman of the Northumberland Company, and that he would not attempt to get any better offer from anyone else." We must take it that this represented the motives and intentions of Mr. Frank Workman and those associated with him. By acting thus he had fettered himself by a promise to the

(1) Scottish Law Reports, lvi, at p. 625.

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English syndicate, and had disqualified himself from acting bona fide in the interests of the company he was leaving. Again, take the affidavit of Sir George Clark, par. 10: "I consider the offer of Robert Clark more beneficial to the shareholders who desire to sell than the offer of the Northumberland Shipbuilding Company or the Doxford Company, and I believe the defendant directors refused to consider it, because they had entered into an agreement with the Northumberland Shipbuilding Company and the Doxford Company to force the sale of the control of the defendant company to them, even at the expense of the shareholders of the defendant company." Sir George Clark swears that he believes the defendant directors are acting in the interest of the English syndicate, and not in the interest of the defendant company or its shareholders, and he states his belief that if the control is transferred to the syndicate the liquid assets of this company may be used for the purpose of buying debentures in the Northumberland Shipbuilding Company instead of for the benefit of the defendant company. Although this is not quite a statement as to facts, it is declared to be the belief of Sir George Clark. It was a challenge that required some answer, and no answer has been given. I desire it to be known that although I hold the defendants' action to have been wrongful and inconsistent with their duty as trustees, I do not in any way impute to them dishonourable conduct or anything in the nature of fraud. What they have done is analogous to cases we are all familiar with, where the donee of a power executes it in pursuance of an arrangement or bargain which he thinks erroneously he is entitled to make.

If I am right in my view of the law on the evidence, I am bound to make the two-fold order applied for, so as to prevent anything final being done to the prejudice of the plaintiffs before the trial of the action. When it does come to be tried it is quite possible that after discovery and interrogatories the case may assume a different complexion.

The costs of both parties must be reserved.

Solicitors for plaintiffs: *White, M'Millen, & Wheeler.*

Solicitors for defendant directors: *M'Lean & Sons.*

Solicitors for the company: *Carson & M'Dowell.*

CUNNINGHAM *v.* CUNNINGHAM.

(1919. No. 176.)

Powell J.

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March 31.

May 20.

1920.

Jan. 30.

Administration — Registered freehold land — Valuation under Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), ss. 2, 3, 5, 6—Charge on real and personal estates in proportion to their values.

Under section 2 of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), the widow of an intestate leaving no issue is entitled to a charge of £500 upon his real and personal estates, to be borne in proportion to the values of the real and personal estates ascertained as in the Act provided.

Held, that the proportion of the £500 charged on the real estate is raisable as a charge, and that the widow is not entitled under the Act to any portion of the real estate in specie.

ORIGINATING SUMMONS.

Joseph Cunningham, late of Brackenagh, in the County of Down, died on the 28th September, 1918, intestate, leaving a widow, but no children. He left several next-of-kin. Letters of administration were granted to his widow, the plaintiff in the summons. The property of the deceased consisted of pure personalty value £362 15s. 4d. Deceased was also entitled to a farm of land held on a tenancy from year to year, the poor law valuation of which was £5 2s. The value of the farm calculated for revenue purposes was nil. The farm was, since the intestate's death, sold for the sum of £550. The deceased was further entitled to two small farms of freehold registered land, the value of which, according to section 5 of the Intestates' Estates Act, 1890, amounted to £78 10s.

The widow brought the present summons for the opinion of the Court as to how the freehold lands were to be valued in the administration account, and as to how her share of the estate and the shares of the next-of-kin should be ascertained.

Powell J. *Wylie K.C.* (with him *Lavery*), for the plaintiff, the widow :—
 1919.
CUNNINGHAM v. CUNNINGHAM say the widow is entitled to £500, to be borne, under section 3 of the Intestates' Estates Act, 1890, in proportion to the value of the real and personal estates respectively, as ascertained by the Act. The farm held on a tenancy from year to year should be valued on the principle laid down in *Attorney-General v. Robinson* (1). The real estate is admittedly valued under section 5 at £78. The widow is entitled to $\frac{4}{7}\frac{5}{8}$ ths of the realty in specie. It is not enough for the administrator to offer me £45 cash, because that is not as valued under the Act: *Farrelly v. Farrelly* (2); *Cooper v. Cooper* (3).

Megaw, for the defendants, the next-of-kin :—

Section 2 of the Intestates' Estates Act makes the £500 a charge upon the real and personal estates. The values of these are to be ascertained as prescribed by the Act, but when they are ascertained the sum of £500 is still merely a charge on each according to their proportionate values. No part of the estate can be taken in specie, but the proportion of the £500 charged on the realty must be raised in the same way as any other charge.

1920.

POWELL J. :—

Jan. 30.

Mr. Wylie has contended that on the figures in this case the widow is entitled to $\frac{4}{7}\frac{5}{8}$ ths of the realty in specie. Notwithstanding the ingenuity of his argument, I do not agree. The value of the personal estate is roughly £912. The value of the real estate, valued under sect. 5 of the Intestates' Estates Act, 1890, is £78. The widow is entitled (a) to £500 under sect. 2; (b) to a charge upon the real and personal estate, and that charge is to be borne and paid in proportion to the value of the real and personal estate respectively. The value of the personal estate is £362 15s. 4d., plus £550, the amount realized by the sale of the tenancy from year to year; total, £912 15s. 4d., subject to deductions for debts and funeral and testamentary expenses under sect. 6. I am of opinion that the tenancy from year to year should be valued, not on

(1) [1901] 2 I. R. 67.

(2) [1918] 1 I. R. 488.

(3) L. R. 7 H. L. 53.

the principle of *Attorney-General v. Robinson* (1), but according to *Powell J.*
the plain words of sect. 6 of the Intestates' Estates Act, according 1920.
to which "the net value of such personal estate as aforesaid shall *CUNNINGHAM*
be ascertained by deducting from the gross value thereof all *v.*
CUNNINGHAM
debts, funeral and testamentary expenses of the intestate, and all
other lawful liabilities and charges to which the personal estate
shall be subject." The personal estate is value for £912.
The real estate is to be valued under sect. 5. The result
is that, of the £500 charged, £461 roughly is to be borne
and paid by the personal estate, and £39 by the realty, and
in addition the widow has her rights under sect. 4. The £39 is
merely charged on the realty, and cannot be taken in specie, as
contended by the plaintiff. I may add that in so deciding I am
only following the invariable practice both of the Master of the
Rolls' Court and of this Court ever since the passing of the
Intestates' Estates Act, 1890.

Solicitors for the plaintiff: *Collins & Collins.*

Solicitors for the defendants: *Fisher, Fisher, & Cromie.*

D. M. S.

(1) [1901] 2 I. R. 67.

Appeal.

1920.

Jan. 23.

Feb. 17.

PATRICK DUFFY v. JAMES DUFFY (1).

Will—Construction—Specific legacy—Legatee directed to pay debts—Undisposed of personalty—Exoneration—Condition attached to bequest.

A testator gave a farm of land to his son Francis, and, having given pecuniary and other legacies, made this provision: "My son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses." There was a residue of undisposed of personalty.

Held, that Francis took the farm on the condition that he paid all the testator's debts and testamentary expenses, that having accepted the bequest he was bound to fulfil the condition, and that the undisposed of residue was exonerated from liability.

CASE STATED by Pim J. on the hearing of an equity civil bill appeal at the Monaghan Summer Assizes, 1919.

Francis Duffy, who died on May 26th, 1917, disposed of his property by will dated May 15th, 1917, in the following terms:—

"I leave and bequeath to my son Francis my farm, houses, and cattle in Tullynamalroe, but with a definite order that he can never sell the farm. I leave and bequeath to my son Thomas, now in America, three acres of land which I own in Rea Duff, together with £50 to be paid to him by my son Francis off my farm in Tullynamalroe. My son Francis is to have the use of the said three acres until my son Thomas comes home. Should my son Thomas not want to have said three acres, my son Francis shall pay him £100 in lieu of same, as well as the £50 already mentioned to be paid him off my farm in Tullynamalroe. Should my son Thomas never come home, or if he should die in America without having accepted the said £150, or the said three acres, I bequeath said three acres to my grandson Francis, son of my son James. I also bequeath to my said grandson Francis the sum of £10, to be paid to him when he desires same. My son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses."

Probate of the will was granted to the defendant James Duffy, the executor.

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

On May 3rd, 1918, an equity civil bill for the administration of the estate of the deceased was issued by the plaintiff, Patrick Duffy.

In the course of the administration it was found that the personal estate of the testator undisposed of amounted to £84 5s. 7d., and that the total amount expended by Francis Duffy, his son, was £92 0s. 6d., including debts of the deceased, £60 2s. 10d., testamentary expenses, £21 17s. 8d., and legacy to grandson, £10.

On the 9th of June the suit came before the County Court Judge on notice of motion, on behalf of the plaintiff, for an order directing the defendant to lodge in Court the sum of £84 5s. 7d., and directing an inquiry as to the next-of-kin of the deceased. The County Court Judge dismissed the notice of motion.

The plaintiff appealed, and on the hearing of the appeal on July 12th, 1919, at Monaghan Assizes, Pim J. held that under the terms of the will the debts, funeral and testamentary expenses of the deceased were primarily payable by the legatee, Francis Duffy, in exoneration of the undisposed of personalty. He reversed the order of the County Court, and sent the suit back to the Judge to proceed with the administration of the estate.

On the application of counsel for the defendant, Pim J. granted leave to appeal by way of case stated. The question for the decision of the Court was: Are the debts, funeral and testamentary expenses of the deceased, primarily payable by Francis Duffy, he having accepted the bequest of the farm, houses, and cattle, or are they primarily payable out of the general undisposed of residue?

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Cusack K.C. and *Lavery*, for the defendant, the appellant:—

We submit that the residue of the personalty undisposed of is primarily liable for the payment of the debts of the testator. A mere charge of debts on real estate does not exonerate the personalty: *Walker v. M'Kay* (1); *In re Banks, Banks v. Busbridge* (2).

RONAN L.J. refers to *Messenger v. Andrews* (3); and *In re Loom* (4).

(1) [1917] I.R. 278, 280.

(2) [1905] 1 Ch. 547.

(3) 4 Russ. 478.

(4) [1910] 2 Ch. 230.

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In this will the debts are merely a charge on the real estate ; and the testator's intention was that the debts, in so far as the undisposed of residue was inadequate to meet them, should be paid by Francis out of the property left to him. [They cited : *Mead v. Hide* (1); *Bridgman v. Dove* (2); *Henry v. Henry* (3); *In re M'Mahon, M'Mahon v. M'Mahon* (4).]

Best K.C. and *Davidson*, for the plaintiff, the respondent :—

The whole frame of the will shows that Francis was to get the property on certain conditions, and that he cannot take it without fulfilling these conditions ; that the debts are an obligation upon him, and that if he takes the property given to him he must assume that obligation. Reading the will, as a whole, this case is similar to that of *M'Mahon v. M'Mahon* (4). In *Henry v. Henry* (3) there was an express direction that the chattels were to be applied to payment of debts.

Cusack, in reply, referred to *Corbet v. Corbet* (5).

Cur. adv. vult.

Feb. 17.

SIR JAMES CAMPBELL C. :—

By his will Francis Duffy left practically his entire property so far as it consisted of land to his son Francis, subject to certain charges in favour of another son and a grandson, and at the end of his will the testator added these words : " My son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses." In the course of an administration suit in the County Court it was found that personal estate of the testator to the value of £84 was undisposed of, and a contest arose between the next-of-kin and the devisee of the land as to whether the devisee was or was not responsible for the payment of the debts, death-bed and funeral expenses.

On behalf of the next-of-kin it was contended that the personal estate was exonerated from its primary liability by reason of the provision at the end of the will which I have just read. On the other hand, it was argued on behalf of the son Francis that the

(1) 2 Vern. 120.

(2) 3 Atk. 200.

(3) 1 R. 6 Eq. 286.

(4) [1901] 1 I. R. 489.

(5) 1 R. 8 Eq. 407.

words were not sufficient to exonerate the personal estate from its primary liability, and a number of cases were referred to dealing with the extent and the nature of the words required in order to result in this exoneration of the personal estate. In the view I take of this will I do not think that question really arises, because in my opinion the provision in regard to the payment of debts, death-bed and funeral expenses, was a condition attaching to the bequest to Francis, and he, having accepted the bequest, cannot now get rid of the condition. The language is very strong, because, having enumerated the bequests to Francis, the will winds up by saying he "shall pay" the debts, etc. The bequest of the land to Francis was on the terms that it was to be subject to the obligation to discharge the liabilities of the testator's estate; and therefore I am of opinion that the question we are asked to determine, namely: "Are the debts, funeral and testamentary expenses of the deceased primarily payable by Francis, he having accepted the bequest of the farm, houses, and cattle?" should be answered in the affirmative.

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Sir James
Campbell C.

RONAN L.J.:—

There is no doubt of the general rule that in order to exonerate the personal estate from its liability to debts there must appear not only an intention to charge the debts on the real estate, but also an intention to exonerate the personal estate. This rule applies where a testator makes provision for the payment of his debts out of his assets. The question always is in such cases what part of his estate shall be applied in payment of his debts. This rule has in my opinion no application where the exoneration is of the entire estate, and the provision is for the payment of the debts from an independent source. Such a provision may be made by act inter vivos, e.g., A agrees with his father B that if B by will gives him his business and business premises he will pay the father's debts. There can be no doubt that B's executors could enforce this contract against A, and that it would be idle for A to suggest that B's personal estate was the primary fund for payment of the debts. The same result can be attempted if B by his will leaves the business, etc., to A on the terms that A shall pay all B's debts. If A accepts the bequest, he must discharge the

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obligation imposed on him by the will. Though not in fact contractual, the personal obligation is equally enforceable. This is a very old and well-settled principle. Curiously, most of the cases in which it was applied were cases of the effect of such a provision in making a devise without words of limitation in a will prior to the Wills Act pass the fee. The rule is thus stated in Hawkins on Wills, first edition, at p. 134: "An indefinite devise is enlarged by a fee-simple by the imposition of a charge, however small, on the person of the devisee or on the quantum of interest devised to him; but not if the devise is merely subject to a charge."

In 6 Cruise's Digest, pp. 221-224, will be found a series of cases where the charge was on the person of the devisee. At present I shall only refer to *Doe v. Holmes* (1), at p. 223 of the Digest. In that case the devise was in these words: "I give and bequeath my freehold house, with the appurtenances, etc., and all furniture thereto belonging, to E. G., whom I make executrix of this my last will; she paying all my just debts and funeral expenses and legacies before mentioned, twelve months after my death. I likewise leave to the said E. G. all the rest and residue of my personal estate." The Judge before whom the case was tried being of opinion that the devisee took a fee, by reason of the words "she paying all my debts," non-suited the plaintiff. On a motion to set aside that non-suit, Lord Kenyon said: "I am clearly of opinion that the direction given at the trial was perfectly right. In cases of this kind the question has always been whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee only takes an estate for life, but in the latter case he takes a fee; otherwise he might be a loser by the devise. Here the devisee is bound to pay the debts and legacies at all events; and the charge is thrown on her in respect of the real estate."

I shall now refer to cases where the obligation to pay directly arose. The first is a remarkable case, as the debts which the devisee was to pay amounted to five times the value of the property to which the condition was attached. The case stood over for an inquiry as to whether he had accepted the bequest.

Here the legatee has not only accepted the bequest, but he has performed the condition. The case is *Messenger v. Andrews* (1). [The Lord Justice read the head-note of the case.] Mr. E. Sugden, for the defendants, said, "The principle of the decision of the Vice-Chancellor was that the lease of the public-house . . . was given to James in consideration of his paying the debts of the testator, and that if James accepted the bequest he became bound to pay the debts. The question is simply a case of construction, and has no connexion with the technical doctrine of conditions as annexed to interests in land." This view was accepted by the Lord Chancellor, Lord Lyndhurst, who says in his judgment: "The points raised in this case depend entirely upon the terms of the will. The first question is whether the qualification annexed to the bequest to James Messenger is a trust or condition . . . Now, I am of opinion that the words 'and my will is that in consideration of the above bequest to my son James Messenger he shall pay, etc., all my just debts, etc.,' annex a condition to the bequest . . . The testator's intention was to give to his son, who had long been employed in his trade, the option of taking the business, provided he paid the debts. The testator does not provide for the payment of his debts thereout, but he makes the payment of his debts the price at which his son was to purchase the public-house and goodwill, and I see nothing unreasonable in such a bequest."

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Although the case is not referred to either in Jarman, Hawkins, or Theobald, it is referred to and its effect stated in 2 Williams on Executors. It is referred to and adopted by Bacon V.-C. in *Rees v. Engelback* (2), at p. 237, thus: "Now, upon the authority of the case of *Messenger v. Andrews* (1), and even without the authority of that case, upon very plain principles of justice and law, the defendant, who admits that he has enjoyed the benefit given to him by a will upon the conditions expressed in it, is under a personal liability, which can be enforced in this Court, of fulfilling those conditions."

In *In re Loom* (3) there was a devise of a leasehold house to A for life, she paying the rent and performing the covenants and

(1) 4 Russ. 478.

(3) [1910] 2 Ch. 230.

(2) L. R. 12 Eq. 225.

Appeal. conditions. *Messenger v. Andrews* (1) was referred to by counsel.
 1920. At p. 233, Parker J. says: "A gift in that form, if the donee
DUFFY accepts the bounty of the testator, imposes in equity a personal
v. obligation on him to fulfil the conditions of the lease; and, having
DUFFY. accepted the conditions, he becomes personally liable to see that
 Ronan L.J. the conditions are fully performed."

There can, I think, be no doubt about the principle: a testator cannot prevent his creditors enforcing payment of their debts against his estate, but he can make a provision of this nature, binding a person who takes a benefit under his will to pay his debts, and therefore to indemnify his estate against the payment thereof. It is not a question of an intention to charge the real and exonerate the personal estate. It is an intention to exonerate both.

Mr. Cusack relied on three cases. In the first, *Mead v. Hide* (2), the devise was to plaintiff "upon condition she paid all his debts owing and legacies." But the decision was on the ground "that the devise amounts but to a charge upon the real estate, and extends not to avoid the estate." With regard to the second, *Bridgman v. Dove* (3), it is impossible to reconcile the statement of the will in the note with the statement in the judgment and the marginal note. It would appear from the note on p. 200, and the note of the decree on p. 201, that the devise was to Sir J. Bridgman, "he paying all such legacies" [not debts] "as I shall charge on these lands." However, two matters appear clearly from the judgment—1, that Lord Hardwicke decided the case expressly on the ground that it was not a condition, but only a charge. He says: "What colour is there to say that this creates a condition on Sir John Bridgman that he shall take nothing but upon paying . . . There is a plain charge in the will upon these lands." He then applies the general rule that this is not sufficient to exonerate the personal estate. It is plain that if he had thought it was a condition the result would have been the other way.

In *Henry v. Henry* (4), decided by the Vice-Chancellor in 1872, the question of condition was not really raised. The nearest approach to it is in the argument at p. 291: "'I give my

(1) 4 Russ. 478.

(2) 2 Vern. 120.

(3) 3 Atk. 200.

(4) 1. R. 6 Eq. 286.

estate to my son on condition he shall pay my debts' is a stronger form of expression than 'I give my estate charged with the payment of my debts.' The testator here contemplates a sort of personal liability attaching to his son to pay his debts." *Messenger v. Andrews* (1) was not cited; nor was the judgment in *Rees v. Engelback* (2), delivered in April, 1871. Williams on Executors was not referred to, though Jarman and Hawkins were. *Mead v. Hide* (3) and *Bridgman v. Dove* (4) are cited, but only for the proposition that the intention must be shown to exonerate the personal estate. Hawkins is cited, p. 287 and p. 296, but there is no reference to p. 134, to which I have referred above. The authorities on the personal obligation of the legatee or devisee are not referred to. There is no suggestion of the exoneration of the entire estate. It is true that the Vice-Chancellor says: "The words, 'they first paying my lawful debts,' are clearly inoperative to effect this," i.e. to exonerate the personal estate. But in the leading case of *Doe v. Holmes* (5), already referred to, these words were held to make the devisee liable to pay the debts at all events. The case is no authority on the question of the personal obligation and the exoneration of the entire estate. On the other hand, about thirty years afterwards the case of *In re M'Mahon* (6) came before the same Judge. There the testator gave his farm and stock to his son Thomas. He then gave certain articles and rights to his daughters. The will then contained the following provision: "It is my will that the said Thomas M'Mahon, my son, do pay off all my debts and burial expenses. It is my will that my son, the said Thomas M'Mahon, do give unto my daughter Catherine M'Mahon the sum of £350."

On this occasion the Vice-Chancellor was referred to four cases: *Doe v. Holmes* (5); *Moor v. Denn* (7), two of the old cases of the class I have referred to; and also to two modern cases, *Pickwell v. Spencer* (8) and *Lloyd v. Jackson* (9). Neither *Messenger v. Andrews* (1), *Rees v. Engelback* (2), nor his own former decision was referred to. The question was whether Thomas had made

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(1) 4 Russ. 478.

(2) L. R. 12 Eq. 225.

(3) 2 Vern. 120.

(4) 3 Atk. 200.

(5) 8 T. R. 1.

(6) [1901] 1 I. R. 489.

(7) 2 B. & P. 247.

(8) L. R. 7 Ex. 105.

(9) L. R. 2 Q. B. 269.

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himself personally liable to pay the £350 to Ellen. The Vice-Chancellor read the will down to the words, "It is my will that the said Thomas Mc'Mahon, my son, do pay off all my debts, &c.," and says: "Now, if the will stopped there, it would be impossible to hold that the farm was not given to Thomas, subject to conditions to be performed by him, or that he could escape the obligations imposed on him." This is conclusive as to the present case. He then proceeds to show that the same principle applies to the gift to Catherine, and says: "The fact of his acceptance of the gift, which I hold to be subject to this condition, makes him personally responsible for the payment. . . . If he chose to take a property subject to a condition, he was bound to fulfil the obligations attached to it."

The case seems a conclusive authority both on the principle involved in the present case and on the construction of the present will.

If *Henry v. Henry* (1) is inconsistent to any extent with this case, I prefer to adopt the view of the Vice-Chancellor as shown in the later case. I have no doubt the Vice-Chancellor followed the principle of the cases cited to him. I would refer to *Pickwell v. Spencer* (2). By a will, dated before 1838, testator gave lands to his wife without words of limitation. He made her executrix and general and residuary legatee, and then directed: "It is also my will that my executrix shall pay my eldest son, William Pickwell, the sum of £5 a year for wages as long as he shall continue to labour on the farm after my decease." There were other provisions in the will on which it was contended that the fee passed. In the Exchequer three Judges held that it was unnecessary to consider these, and they decided that the direction to pay imposed a personal obligation on the devisee, and therefore the fee passed. The difficulty was that the direction was "to my executrix." They held, however, that it was a direction to her, not "as executrix," but as designated person.

In the Exchequer Chamber Cockburn C.J. said that the charge seemed rather imposed on her qua executrix, and decided that the fee passed under the other provisions in the will. Willes and Grove JJ. concurred with Cockburn C.J. Blackburn J. based his judgment

(1) I. R. 6 Eq. 286.

(2) L. R. 7 Ex. 105.

solely on the ground of the direction to pay; that it "is a charge upon her personally." Mellor and Brett JJ. held that the fee passed both on the ground taken by Blackburn J., and also on the other provisions in the will. This is a modern case of the highest authority. There can be no doubt, reading the judgments, that if the direction to pay had been "to my wife" instead of "to my executrix," the Judges would have held that it imposed a personal obligation. Even as it was, six out of the nine so held. The remaining three did not decide the opposite way; they thought the other ground clear. The words I have quoted from the Chief Justice's judgment only suggest considerable doubt. The direction in the present will presents no such difficulty. This case seems to me conclusive on the construction of the present will.

The question of construction is whether the will imposes a personal obligation on Francis to pay the debts. The will imposes four obligations, which I have numbered 1, 2, 3, and 4. 1. To pay £50 to Thomas "off the farm"; 2, subject to an increase to £150 off the farm. Then comes a conditional bequest to the grandson Francis of three acres, and then follow these words: 3, "I also bequeath to my said grandson Francis the sum of £10, to be paid to him when he desires same; 4, my son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses." He then appoints P. Duffy executor. Now 1 and 2 are expressly made payable "off the farm." 3 and 4 are unlimited in terms. The only possible doubt would arise from the word "also." It seems plain that it refers to the antecedent gift of the £10, and shows that Francis the son is to pay it; but it cannot possibly connect the legacy of £10 to Francis the grandson with the previous gifts, 1 and 2, to Thomas. The word "also," in short, connects 3 and 4, and has no reference to 1 and 2; 3 and 4 therefore impose a personal obligation on Francis the son to pay the £10 and the debts, &c. He has accepted the bequest, and he has discharged the obligation. He cannot claim to be recouped out of the personal estate undisposed of, for payments made by him which he was bound to make as the price of the bequest which he accepted.

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O'CONNOR L.J. :—

I agree. The testator by his will bequeathed his farm, houses, and cattle in Tullynamalroe, . . . and after making other bequests, the will says : " My son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses."

The testator, as will be seen, made no gift of the residue of his property, and the residue so undisposed of amounts to the sum of £84. The question for our decision is : are the debts, funeral and testamentary expenses to come out of the undisposed of residue, or are they to be paid by testator's son Francis?

The general rule as to the exoneration of the personal estate is thus stated by Buckley J. in *In re Banks* (1) : " The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses, but the testator may exonerate it either by express words or by an indication of intention to be found in the will which leads to the Court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find, not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate exoneration." Are there words in this will which operate exoneration? I think there are.

A legatee under a will cannot approbate and reprobate. If a testator leaves a legacy on condition that the legatee makes a payment or does some other thing, then the legatee cannot take the legacy without being obliged to make that payment or do that thing. That principle is clearly established by *Messenger v. Andrews* (2), and acted upon since in many cases, amongst which may be mentioned *Rees v. Engelback* (3); *In re Loom* (4). It is scarcely necessary to say that a condition can be annexed to a legacy without the use of the word " condition." If a testator makes a bequest, and subsequently in the will directs or orders, in clear and

(1) [1905] 1 Ch., at p. 549.

(2) 4 Russ. 478.

(3) L. R. 12 Eq. 225.

(4) [1910] 1 Ch. 230.

unequivocal and imperative language, that the legatee shall do something, it is clear, in my opinion, that that imports a condition attached to the bequest to do the thing directed or ordered. The will in question here is a clear and simple example of this obvious result of common sense and justice. Francis gets the farm on condition of his paying all the testator's debts and demands. He was not obliged to take the farm, but having taken it, he must pay the debts and demands. The language of this will is different from that in *Henry v. Henry* (1)—about the decision in which all I say at the present is that I have grave doubt as to its correctness.

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Solicitor for the appellant: *C. Laverty.*

Solicitor for the respondent: *J. C. Reid.*

C. L.

(1) I. R. 6 Eq. 286.

M. R.

1920.

March 9.

CORKERY *v.* EGAN.

(1919. No. 821.)

Practice—Order dismissing out of Lunacy and transferring to Chancery Division—Subsequent procedure.

Procedure where, on the death of a lunatic, an order has been made under the Lunacy Regulation (Ireland) Act, 1871 (34 Vict. c. 22), s. 55, terminating the matter in, and dismissing it out of, lunacy, and transferring it to the Chancery Division.

By an order in lunacy, dated the 22nd January, 1919, made by the Lord Chancellor in the matter of Timothy J. Egan, a person of unsound mind, deceased, and confirming a report of the registrar made on the death of the lunatic, it was (amongst other things) ordered that the matter do stand terminated in, and dismissed out of, lunacy. And thereupon it was further ordered that it be, and it was thereby, transferred to the Chancery Division of the High Court of Justice, Ireland, to be there proceeded with as if an action had been commenced for the administration of the real and personal estate of the said Timothy J. Egan, and a decree for such administration had been pronounced therein; and in such action it was further ordered that Stephen O'Brien Corkery be taken to be plaintiff, and James Egan and Mary Egan, infants under the age of twenty-one years, be taken to be defendants.

See the Lunacy Regulation (Ireland) Act, 1871 (34 Vict. c. 22), s. 55.

The said Timothy J. Egan had died on the 31st January, 1918, a widower and intestate, leaving two children, James Egan and Mary Egan, then aged about ten and seven years respectively. He had carried on a hotel business in premises in Killarney, held in part under a fee-farm grant, and in part under leases for years. Letters of administration of his personal estate had on the 23rd August, 1918, been granted to Stephen O'Brien Corkery, the committee in the lunacy matter.

The solicitor having carriage brought the said order to the Consolidated Record and Writ Office, and the matter was there, on the 9th October, 1919, given a record number and marked for the Master of the Rolls, and was entered in the Cause Book, with the title: Matter of estate of Timothy J. Egan, a person of unsound mind, deceased. Stephen O'Brien Corkery, plaintiff; Mary Egan and James Egan, infants, defendants.

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The said defendants entered an appearance by Daniel T. Sheehan, their guardian ad litem, on the 28th January, 1920.

The said plaintiff now applied by motion on notice for an order—1, that, in pursuance of the order of the 22nd January, 1919, the usual accounts and inquiries be taken and made for the administration of the real and personal estate of the said Timothy J. Egan, and that with respect to same the chief clerk be at liberty to act on any finding or evidence in the lunacy matter; 2, that the said hotel premises and business, &c., be forthwith sold; 3, that pending such sale the plaintiff do continue to carry on and manage the said business; 4, that the costs of the application be costs in the cause.

The application was grounded on the said order of the 22nd January, 1919, the previous proceedings in lunacy, a Record and Writ Office certificate showing the transfer of the matter, &c., and an affidavit of the plaintiff stating the facts and showing the expediency of an immediate sale.

D. M'C. Mahony, for the plaintiff, in support of the motion.

Bernard Roche, for the defendants, also supported the application.

On the question of the sale of the real estate, Order 51, rule 1, was referred to.

THE MASTER OF THE ROLLS made an order that the following accounts and inquiries be taken and made at Chambers:—No. 1 (inquiry as to next-of-kin); No. 2 (account of the personal estate come to the hands of the plaintiff, &c.); No. 3 (account of debts); No. 4 (account of funeral expenses); No. 5 (inquiry as to outstanding personal estate); No. 6 (inquiry as to real estate);

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No. 7 (account of rents of real estate); No. 8 (inquiry as to incumbrances on real estate); No. 9 (an inquiry as to heir); and that in taking the accounts and making the inquiries the Chief Clerk be at liberty to adopt the results of the accounts and inquiries taken and made in the Chambers of the Lord Chancellor in the lunacy matter, and to act on any evidence adduced therein; and that the premises, hotel business, furniture, &c., stock, goodwill, and licence be sold at such time and place by such person or persons, and subject to such conditions of sale as should be settled by the Judge at Chambers; and that pending such sale the plaintiff do continue to carry on and manage the said hotel business; and that the further consideration of the action and the question of costs be adjourned.

Solicitor for the plaintiff: *Eugene J. Downing.*

Solicitor for the defendants: *James Egan.*

R. R.

DAVY v. CLARKE.

(1918. No. 1143.)

Powell J.

1919.

Oct. 30.

Nov. 18.

Will—Power of appointment—Exercise—Special power—Remoteness.

A testator, who died in 1881, devised his lands to A for life, and after A's death to any son or sons "as he shall deem most deserving and attaining the age of twenty-five years," and, if A should die without male issue, over.

A had issue three sons, B, C, and D, all born before the testator's death. A, who died in 1918, by his last will made in 1918, in exercise of the power of appointment, appointed the lands to his sons C and D and to the eldest son of B.

Held, a good appointment to C and D, and not void for remoteness.

ORIGINATING SUMMONS brought by the administrator of Patrick J. Davy, the survivor of the trustees appointed by an order of the Irish Land Commission, dated 22nd May, 1900, in a matter then depending in the Court of the Irish Land Commission, that the person or persons now entitled to certain capital moneys might be ascertained, and that, if necessary, it should be referred to Chambers to inquire who is or are now entitled to these capital moneys, and for what interest or interests, and, if more than one, in what shares and proportions, and, if necessary, that the trusts affecting these capital moneys be administered under the direction of the Court.

James Clarke, the testator, being seised in fee of certain lands in the county of Galway, made his will, dated 9th day of June, 1881, of which the following is the only clause material to the present report:—"I bequeath to my son, Richard A. Clarke, all my right, title, and interest in the house, lands, and premises of Thomastown . . . in the county of Galway, and to hold and enjoy the same for and during his natural life only, and after his death to any son or sons lawfully begotten in wedlock as he shall deem most deserving and attaining the age of twenty-five years; and in case my said son, Richard A. Clarke, should die without male issue as aforesaid, I bequeath the said lands and premises to my son,

Powell J. Albert Clarke, during his natural life only, and after his death to
 1919. — any son or sons as he shall deem most deserving in like manner
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v. and attaining the age of twenty-five years, subject to the charges
CLARKE. hereinafter set forth; and should both my said sons die without
 leaving male issue lawfully begotten in wedlock then surviving
 and attaining the age of twenty-five years, I bequeath the said
 lands, houses, premises, interests to their lawful heirs and
 assigns."

James Clarke died on 14th June, 1881, and Richard A. Clarke thereupon entered into possession of the lands. Richard A. Clarke married, and there was issue of his marriage James Clarke (the younger), and the defendants, John Clarke and Richard F. Clarke, all born before 1881. Richard A. Clarke made his last will, dated 5th June, 1918, and thereby, in professed exercise of the power of appointment given to him by the will of the testator, James Clarke, appointed and devised the lands of Thomastown, &c., to his sons, the defendants, John Clarke and Richard Clarke, and the eldest son of James Clarke (the younger); and, after bequeathing certain pecuniary legacies, devised and bequeathed the residue of his property to the defendants, John Clarke and Richard Clarke. Richard A. Clarke died on the 19th July, 1918.

H. R. Poole, for the plaintiff. [He referred to *In re Clarke's Estate* (1).]

S. L. Brown K.C., for the defendants John Clarke and Richard F. Clarke:—

I am not affected by Ross J.'s decision in *In re Clarke's Estate* (1), as the terms of the gift in that case were not the same as the terms of the gift to Richard A. Clarke. I contend that Richard A. Clarke took a life estate with a power of appointment, which he has well exercised as to two-thirds in favour of my two clients. If Richard A. at the time of the testator's death had no children, then clearly the power would be bad, but Richard A. had three sons living at the testator's death, viz., my clients and James Clarke (the younger). The fact that a power may be exercised so as to create a perpetuity does not make it bad if it is possible

to be validly exercised, and is in fact validly exercised : *Griffith v. Powell J.*
Pownall (1); *Slark v. Dakyus* (2). I rely upon the fifth rule laid 1919.
 down by Vice-Chancellor Page-Wood in *Cattlin v. Brown* (3); A. Y
In re Russell, Darrell v. Russell (4). v.
CLARKE.

H. D. Conner K.C., for the widow of Albert Clarke :—

This Court is bound by the decision in *In re Clarke's Estate* (5), where Ross J. decided that the power of appointment was bad. The life estate was not in question. It had ceased, and the only question was as to the validity of the power of appointment. That decision was right, and should be followed. The class among whom the estate was to be divided might not be ascertainable till after lives and twenty-one years. The selection might not be possible to be made till after lives and twenty-five years. Richard A. Clarke could not select till the class attained twenty-five. Therefore the time of selection was remote. He was to select the most deserving. Therefore he could not select till all attained twenty-five : *Blight v. Hartnoll* (6). The decision in *In re Halinan's Trusts* (7) is good, because the time of vesting there must be determined within lives and twenty-one years, and the class had to be ascertained within the proper time. I rely on the fourth rule in *Cattlin v. Brown* (3).

Leonard K.C., for the defendant Herbert Clarke :—

I adopt Mr. Brown's argument. Richard A. Clarke was bound in his own lifetime to make the selection ; therefore the time for selection was not remote.

Devitt, for the daughters of Richard A. Clarke.

POWELL J. :—

Nov. 18.

The questions which I have to determine are—1, what estate and interest Richard A. Clarke took in the lands in question under the provisions of the will of his father James Clarke the elder ; and 2, whether the power of appointment to Richard A. Clarke is a valid power, and validly exercised by Richard A. Clarke by his will of the 5th June, 1918?

(1) 13 Sim. 393.

(4) [1895] 2 Ch. 698.

(2) 10 Ch. App. 35.

(5) 39 I. L. T. R. 78.

(3) 11 Hare, 372.

(6) 19 Ch. D. 294.

(7) [1904] 1 I. R. 452.

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Mr. Brown contended that Richard A. Clarke took a life estate, and that his sons John and Richard Clarke take under the appointment in the will of Richard A. Clarke of the 5th June, 1918.

Mr. Conner contended, first, that Richard A. Clarke took an absolute interest under the will, and secondly, that the power of appointment to Richard A. Clarke was not valid, as it offends against the rule against perpetuities. It was pointed out at an early stage of the argument that the devises and bequests in the will of James Clarke the elder to Albert Clarke, of the other lands mentioned in the will, and the power of appointment to Albert, had formed the subject-matter of a decision of Mr. Justice Ross in *In re Clarke's Estate* (1), who decided that an absolute gift had been made to Albert Clarke in the earlier part of the will affecting the devises to him; that the gift over was void for remoteness, and consequently that the whole limitation failed; that the absolute gift remained unaffected, and accordingly that Albert Clarke took an absolute estate. Mr. Conner contended that this is a decision which governs the two questions which I have to determine, because, he says, the devise to Albert and the gift over are substantially the same as those which apply to Richard A. Clarke. I need hardly say that if I were satisfied that Mr. Justice Ross had decided the points which I have to decide, I should follow his decision, leaving it to the Court of Appeal to review my decision, in which event of course they would not be bound by the decision of Mr. Justice Ross; but in regard to the devise to Richard A., with which I have to deal, the words of the will are not the same as the words of the devise to Albert, and the power of appointment to Albert was never exercised at all, as I understand.

In my opinion, the two devises are quite different. In the one under consideration there is no absolute gift at all as far as I can see, but a plain devise of a life estate followed by a gift over. In these circumstances I must treat the question which I have to determine quite irrespective of the decision of Mr. Justice Ross.

I am of opinion, so far as this part of the case is concerned, that under the will of James Clarke the elder, Richard A. Clarke

took a life estate in these lands under the will, with a power of appointment as therein. *Powell J.*
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There remains the question as to the validity of the power of appointment. Mr. Brown contends that the power has been validly exercised; that Richard A. Clarke has validly exercised it by his will as to two-thirds in favour of his two sons, John Clarke and Richard Clarke. It is not contended that the appointment of the remaining one-third to the eldest son of James Clarke, the younger, was valid.

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Mr. Conner says that the children of Richard A. Clarke represent a class attaining twenty-five, and that where the gift to a class is stated by the donor of the power in terms which may include objects of the gift which cannot be ascertained within the rule against perpetuities the power is bad, and that it could not be argued in the present case that on this ground the power in question was not invalid.

No doubt some of the objects of the power might be beyond the limits. But this does not determine the question which I have to decide. If Richard A. Clarke had no son born at the date of the death of James Clarke the elder, the donor of the power, admittedly the power could not be validly exercised; but the two sons in favour of whom the power was exercised were both living at the date of the death of James Clarke the elder, and they had both attained the age of twenty-five at the date of the will of Richard A. Clarke, the instrument by which the power was exercised, and, of course, at the date of the death of Richard A. Clarke, and he had a power of selection; and the question is whether or not the power was exercised in such a way as not to offend against the rule against perpetuities.

Mr. Brown cited *Griffith v. Pownall* (1), where under a certain indenture trustees of a sum of £10,000 were to pay the dividends to Elizabeth, the wife of James Pownall, for her separate use for life, and after her death the dividends of one moiety to Jane Pownall for life, and after the death of the survivor of them the trustees were to transfer that moiety to all or any one or more of the children of Mr. and Mrs. Pownall begotten or to be begotten, or unto any one or more of such children, and all or any of the

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issue of all or any such child or children at such time or times in such shares, &c., as Edward Hill should by deed or will appoint, and, in default of appointment, the trustees were to transfer such moiety to all the children of Mr. and Mrs. Pownall begotten or to be begotten equally, and after Mrs. Pownall's death they were to transfer the other moiety in like manner. Mr. and Mrs. Pownall had four sons and two daughters living at the date of the indenture, and they never had another child. Edward Hill by his will, dated 24th January, 1800, after reciting this indenture, and that there were six children of Mr. and Mrs. Pownall then living, appointed that the shares of the £10,000 stock which such of the children of Mr. and Mrs. Pownall begotten or to be begotten as were or should be daughters would be entitled to in default of appointment should remain vested in the trustees upon trust as to one moiety thereof after the decease of Mrs. Pownall; and as to the other moiety, after the decease of her and her husband, to pay the dividends to such of the daughter and daughters as should have attained twenty-one, or be married, for the respective use for life according to their respective shares of the capital, and that after their death the trustees should transfer their shares of the capital unto and equally between and among all their children respectively.

One question in the case was whether the appointment to the children of the daughters of Mr. and Mrs. Pownall begotten or to be begotten was not void for remoteness. That question was argued by counsel for the children of a lady who was one of Mr. and Mrs. Pownall's children and by counsel for the lady. Counsel for the children contended that so far as their clients were concerned the appointment was not too remote, for their mother was living at the date of the deed creating the power, and therefore the appointment would have been valid if it had been inserted in that deed. The Vice-Chancellor (Sir Launcelot Shadwell) said the power was good in its creation, for, although some of the objects of it might have been beyond the limit which the law prescribed, it was a power of selection, and the donee might have selected such of the objects as were within the prescribed limit. "I admit" (he says) "that if a person having a power over a fund appoints it, in bulk, among a set of persons collectively, some of whom are within the rule of law as to

perpetuity, but the rest of them are not, the appointment is void in toto, and, that being so, the question is whether the appointment which the testator in this case has made is an appointment of that description. In order to determine that question, we must have regard to the language which the testator has used." He then goes minutely into the language of the will, and he says that it was manifest from the language which the testator had used that he did not appoint the bulk of the fund, but merely directed how the share of each daughter should go after her death. If there had been a seventh or an eighth daughter, the appointment would have been bad to their children, but that, nevertheless, the appointment as to Mrs. F.'s share would have been good, for the partial invalidity of the appointment with regard to the shares of her younger sisters could not affect in the slightest degree the validity of the appointment of her share.

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In *Slark v. Dakyns* (1) the testator by his will gave certain real estate and personal estate to trustees upon trust for his granddaughter, Anna Maria Slark, for her life, and after her death in trust for all and every or such one or more exclusively of the other or others of the children or child born or to be born of the said Anna Maria Slark by William Slark the younger, and any future husband and husbands, their, his, or her heirs, executors, administrators, and assigns respectively, with such provision for their maintenance, &c., and at such age, day, or time, or respective ages, days, or times, &c., and upon such conditions, with such restrictions and in such manner as the said Anna Maria Slark should during her life by any deed or deeds, instrument or instruments, in writing, or by her last will, direct or appoint, and, in default of appointment, in trust for such of the children of Anna Maria Slark who, being a son, should attain the age of twenty-one years, or, being daughters, should attain that age or marry. The testator died in 1846, and at the time of his death Anna Maria Slark had living six children—a son, William Slark, a daughter, Eliza Jane Cope, and four other daughters. By her will, dated 8th December, 1865, Anna Maria Slark directed that, subject to an annuity of £100 a year to one of her daughters, the fund should be held upon trust as to one-fifth share to pay the income of such

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share to her daughter Eliza Jane Cope during her life for her separate use, without power of anticipation. She made a similar appointment as to the son and as to three of the four other daughters, and directed that, subject as aforesaid, each one-fifth share should after the decease of each son or daughter be held for such trusts, intents, and purposes as he or she respectively should by his or her will, in writing, or any codicil or codicils thereto, or any writing in the nature of or purporting to be a will or codicil, direct and appoint; and then follows a proviso in default of appointment to the contrary under her powers. Anna Maria Slark died in 1871. Eliza Jane Cope died in 1870, leaving her husband and a child her surviving. A question arose whether the share given to Eliza Jane Cope for her life was well appointed after her death. Counsel for the appellants admitted that the gift to Eliza Jane Cope for her life was good, but that the gift to her of a power of appointment by will was bad, and therefore that the gift over failed, and that the consequence was that the gift over in the original testator's will came into effect. It was argued that the power given to Eliza Jane Cope to appoint by will was bad, both as being too remote and as not authorized by the power given by the will of the testator; that it might have been given to a child of Anna Maria Slark born after the death of the testator, and that that would have been against the rule as to perpetuities, inasmuch as the property could not have been dealt with during the life of the child. Lord Cairns, in giving judgment on the question of perpetuity, said there was no doubt that under the power which the original testator by his will gave to his grand-daughter it might have been exercised so as to give interests to the children born after his death, and might therefore have contrived to give interests which would be void under the rule against perpetuities, but that it did not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void. Power to appoint amongst issue *prima facie* means indefinite issue, and might include persons beyond the line, but the question in all cases was, what has been done? The appointment actually made by Mrs. Slark clearly did not offend against the rule against

perpetuities, for she appointed to those children only who were existing at the date of the death of the testator. Powell J.
1919.

Mr. Brown relied upon *Cattlin v. Brown* (1), and in particular the fifth rule laid down by the late Vice-Chancellor (Sir William Page-Wood). The question there arose upon a devise, and not upon a power of appointment; but the principle, so far as the rule against perpetuities is concerned, is the same. The fifth rule laid down in that case is as follows:—"Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law."

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In *Thompson v. Thompson* (2) a testator gave his residuary estate upon trust for his wife for life, and, after her decease, upon trust for the benefit of his brother Charles Thompson, and his present and future issue as his said wife should appoint. The wife appointed the property in trust for Charles Thompson for life, and, after his death, for all his children who had attained or should attain the age of twenty-five years if born in her lifetime, or twenty-one years if born after her decease. Charles Thompson had nine children only, all of whom were born in the lifetime of the original testator, and all of whom had attained twenty-five before the death of the appointor. It was held that upon the appointment taking effect, it was certain that, within the limits of perpetuity, not only would the persons to take be ascertained, but their interests would be vested, and the amount of their shares fixed, and consequently that the appointment was valid. The words of the will of Mary Thompson were: "In trust for all and every the children or child of the said Charles Thompson, who being male have attained or shall attain the age of twenty-five years if born in my lifetime; or twenty-one years if born after my decease, or being female have attained or shall attain the age of twenty-five years if born in my lifetime, or twenty-one years if born after my decease, or she, being a female, be previously married, and if more than one such child, in equal shares." Mary

(1) 11 Hare, 372.

(2) [1906] 2 Ch. 199.

Powell J. Thompson died on the 1st February, 1893. Charles Thompson
1919. died on the 17th March, 1905, having had nine children only, all
DAVY of whom were born in the lifetime of the original testator, and
v. all of whom were still living and had attained the age of twenty-
CLARKE five years before the death of Mary Thompson. The question for
determination was whether the appointment contained in the will
of Mary Thompson to the children of Charles Thompson was
good in favour of any and each of the children of the said Charles
Thompson, or whether such appointment was void under the rule
against perpetuities. Mr. Younger (now Lord Justice Younger),
on behalf of two of the sons of Charles Thompson, said that,
interpreted in the light of existing circumstances, the words
which ought to be read into the will of the original testator were
as follows:—"In trust for Mary Thompson for life, and after
her death for Charles Thompson for life, with remainder to the
children of Charles Thompson living at my death who shall
attain twenty-five, and to such of them if born in the lifetime of
Mary Thompson as may attain twenty-one." That would have
been a perfectly good class, and the appointment is consequently
valid. Mr. Hughes, for persons entitled in default of appoint-
ment, argued that the appointment was invalid as transgressing
the limits of perpetuity. Reading the appointment into the
will of the original testator, there was the gift to the children of
Charles Thompson born in the lifetime of Mary Thompson who
should attain twenty-five. The class was not closed until the
death of the survivor of them, and a gift which was void
for remoteness could not be made good by subsequent events.
Mr. Justice Joyce in his judgment said the rule against perpe-
tuities required that every estate or interest must vest if at all
not later than twenty-one years after the determination of some
life in being at the creation of such estate or interest, and not
only must the person to take be ascertained, but the amount of
his interest must be ascertainable within the prescribed period.
Or the rule may be stated thus:—"A gift or other limitation of
any estate or interest to take effect in enjoyment or possession at
a future time, and which is not from the time of its creation a
vested estate or interest, will be void, ab initio, if at the time
when the limitation takes effect there is the possibility that the
estate or interest limited will not vest within the period of a life

or lives in being, or within a further period of twenty-one years thereafter. Where, as in the present case, the will under consideration is made in exercise of a special power of appointment, the question whether an estate or interest appointed by it be too remote depends upon its distance from the creation, not from the exercise of the power. In other words, the period within which estates and interests limited by the appointment made in exercise of a special power must vest does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator. In the case of a will made in exercise of a power of appointment as to any estates or interests given which vest immediately upon the testator's death, or must vest within twenty-one years afterwards, if the testator, the donee of the power, was living at the time of its creation, there is no objection on the ground of remoteness, since what is given must vest immediately upon or within twenty-one years after the determination of a life—that of the donee of the power which was in existence at the time of the creation of the power. In the case of a power to appoint by will, however remote, if the donee of the power was alive at the time of its creation, any appointment to objects of the power specified by name or otherwise, but capable at the death of the donee of the power of being ascertained immediately, must be unobjectionable, notwithstanding that neither the appointees, nor their parents, nor their grandparents, were alive at the time of the creation of the power, for the interests of the appointees vest at the appointor's death, and the appointor was living when the power was created. But if future estates or interests be given by the will of the donee of the power, the question may arise whether such estates or interests are or are not within the limits allowed by the rule which requires them to vest not later than twenty-one years after the determination of some life in being at the time of the creation of the power. The present case is that of an appointment by will in exercise of the special power created by the will of John C. Thompson, so that the date of the creation of the power was the death of this testator, which occurred in the year 1872. Mary Thompson, the donee of the power, was then living; consequently, as to any gift by her will exercising the power that vested immediately upon

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her death, no question of remoteness arises, whether such gift was to persons by name, or to persons capable of being definitely ascertained at once, provided that the amount of their shares was also ascertainable within the prescribed period. Again, an appointment by her will to children that attain twenty-one or previously marry of any person who was living at the death of John C. Thompson, the original testator, is obviously unobjectionable." He says, further, that when it is stated in Jarman on Wills, 5th ed., vol. i, p. 259, that the test by which the validity of such a gift as that which I have had to consider must be tried is to read it as inserted in the deed or will creating the power, that does not mean that the precise language of the instrument exercising a power—in that case the will of Mary Thompson—is to be read into the instrument creating it, namely, the will of John C. Thompson. The will of Mary Thompson was an ambulatory document, having no force or effect until her death. Inasmuch, therefore, as the appointment made by the will of Mary Thompson was so made that the persons who, according to the true construction of such will, were to take under it and the shares they were to take would necessarily be ascertained, and their interests vest not later than the expiration of twenty-one years from the death of Charles Thompson, who was living at the death of the testator by whose will the power was created, the appointment made by the will of Mary Thompson was perfectly valid.

In the present case the will of Richard A. Clarke is made in exercise of a special power of appointment, and as the estate or interest given to the two sons, John and Richard, vests immediately upon his death, and as the donee of the power, namely, Richard A. Clarke, and the objects of the power were all living at the time of its creation, namely, the date of the death of James Clarke the elder, and as both the sons of Richard A., the objects of the power, had attained the age of twenty-five when the power took effect, viz., at the time of the death of the donee of the power, Richard A., and at the date of his will, there does not appear to be any objection on the ground of remoteness.

Solicitor for the executors: *Plunkett Kenney.*

Solicitor for the defendants: *Henry J. Concannon.*

Solicitors for the widow of Albert Clarke: *Cochrane & Co.*

JOHN S. HALLEY v. THOMAS O'BRIEN AND FRANCIS
WOODS.Powell J.
1920.

(1919. No. 152.)

Feb. 6.
March 30.

Administration—Sale by Executor without the sanction of the Court—Statute of Frauds, s. 4—Memorandum—Signature of party to be charged—Sufficiency.

A testatrix by her will appointed two executors, and, having bequeathed certain pecuniary legacies, devised and bequeathed the residue of her estate to one of the executors absolutely. One of the legacies being unpaid, the legatee brought a suit for the administration of the estate of the testatrix, and a decree for administration was made. All the other legacies, and the debts and funeral and testamentary expenses had already been paid. After the decree the executors, without obtaining the sanction of the Court, agreed to sell leaseholds, portion of the estate. The conditions of sale stipulated that the sale was to be subject to the approval of the Court. The executors afterwards refused to complete on the ground that without the sanction of the Court they could not exercise their power of sale. *Held*, that the purchaser was entitled to specific performance of the contract.

The solicitor for the vendors of land which had been knocked down at an auction prepared a memorandum of the agreement for sale, in the body of which the names of the vendors appeared, and he wrote at the end of the memorandum, "I confirm above sale on behalf of the vendors," with the intention that the auctioneer should sign that statement. He presented the memorandum to the purchaser for his signature, and the purchaser signed it; the document was not signed by the auctioneer or by the vendors.

Held, that the document constituted a sufficient compliance with the Statute of Frauds, sect. 4.

ACTION.

Mary O'Brien died on 23rd November, 1914, leaving a will, of which probate was on 24th July, 1915, granted to the defendants, the executors named therein. By her will the said Mary O'Brien gave several pecuniary legacies, including a legacy of £100 to her niece, Mary Curran, and devised and bequeathed to

Powell J. the defendant, Thomas O'Brien, absolutely, the residue of her
1920. real and personal estate. Mary Curran not having received pay-
ment of the legacy bequeathed to her, brought an action for the
HALLEY administration of the real and personal estate of the testatrix, and
v. on 28th November, 1918, an order for administration was made,
O'BRIEN. with a stay upon the order until the first day of the next sittings,
for the purpose of enabling the defendant Thomas O'Brien to
raise the money with which to pay the said legacy and the costs
of the administration action. All the other legacies bequeathed
by the will of Mary O'Brien and all her funeral and testamentary
expenses had already been paid.

On 21st December, 1918, the defendants as executors of the will of the said Mary O'Brien, without obtaining the sanction of the Court, put up for sale by auction certain leasehold property, portion of the assets of the testatrix; the eighth condition of sale provided that the sale was subject to the approval of the Judge of the Chancery Division should the same be found necessary. The premises were knocked down to the plaintiff, who signed a memorandum presented to him by the defendants' solicitor, whereby he acknowledged himself the purchaser from the defendants of the property described in the particulars, and bound himself to complete the purchase; the names of the defendants, "Thomas O'Brien and Francis Woods," had been inserted in the document by their solicitor; neither defendant signed the memorandum himself. At the end of the memorandum the defendants' solicitor wrote, "I confirm above sale on behalf of the vendor," with the intention that the auctioneer should sign his name to that statement, but it was never signed by the auctioneer or by either of the vendors.

The defendants having refused to complete, the plaintiff brought the action claiming specific performance of the contract of sale.

The defendants pleaded (*inter alia*) that after the order for the administration of the estate of Mary O'Brien the defendants could not exercise their power of sale without first obtaining the sanction of the Court, and that there was no note or memorandum of the contract to satisfy the Statute of Frauds.

Battersby K.C., *Clancy K.C.*, and *Jos. Kenny*, for the plaintiff :— *Powell J.*
1920.

Executors are entitled to exercise their power of sale notwithstanding a decree for the administration of the estate: *Neeves v. Burrage* (1); *Berry v. Gibbons* (2); *Price v. Price* (3).

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The insertion in the memorandum of the names of the defendants by their solicitor is a sufficient signature within the Statute of Frauds to bind the defendants: *Evans v. Hoare* (4); *Schneider v. Norris* (5); *Torret v. Cripps* (6).

Gibson K.C., *J. M. Whitaker K.C.*, and *Connolly*, for the defendant Thomas O'Brien.

When a decree for administration has been made, executors cannot exercise their power of sale without first obtaining the sanction of the Court: *Williams on Executors* (10th ed.), 710; *Daniell, Chancery Practice* (8th ed.), 931; *Neeves v. Burrage* (1); *Annesley v. Ashurst* (7); *Loneragan v. Hoban* (8).

The memorandum was not signed by the defendants, and does not comply with the Statute of Frauds, sect. 4. It was not the intention that the document when signed by the plaintiff should be the final memorandum of the contract binding on the defendants, as the document in *Evans v. Hoare* (4) was; the intention was that the defendants should be bound by the signature of the auctioneer to the statement written at the end of the document.

Sealy K.C., and *Kinahan*, for the defendant Francis Woods:—

The defendant Francis Woods has always been willing to do all acts necessary to complete the sale, and submits his rights to the Court.

POWELL J.:—

March 30.

[His Lordship, having referred to the facts as above, proceeded :—]

In my opinion, the two questions which I have to determine are:

1. Is it lawful for an executor to sell the property of his testator

(1) 14 Q. B. 504, at p. 511.

(2) L. R. 8 Ch. 747.

(3) 35 Ch. D. 297.

(4) [1892] 1 Q. B. 593.

(5) 2 M. & S. 286.

(6) 27 W. R. 706.

(7) 3 P. Wms. 282.

(8) [1896] 1 I. R. 401.

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in the circumstances existing in this case without the previous sanction of the Court, and is the defendant Thomas O'Brien entitled to rely upon the order of 28th November, 1918, as affording him a defence to the present action; in other words, to rely upon his own alleged irregularity in selling the property notwithstanding the existence of the order of the 28th November, 1918? 2. Has the Statute of Frauds been complied with?

Mr. Gibson referred to Daniell's Chancery Practice, 8th ed., page 931, and to the statement on that page as follows:—"After judgment the authority of the Court must sanction every subsequent proceeding. Thus, the trustees cannot commence or defend any action or suit or interfere in any other legal proceeding without first consulting the Court as to the propriety of so doing; and a trustee for sale cannot sell, though the ordinary judgment pronounced at the hearing of an administration action, and not directing the appointment of a Receiver or containing an injunction against dealing with the estate, does not invalidate the title of persons claiming under a disposal made in exercise of the legal powers of the personal representative. Application for the sanction of the Court in such cases is usually made by summons, supported by an affidavit or other evidence of the facts." The author refers in the foot-note to *Berry v. Gibbons* (1), relied upon by Mr. Battersby in his contention that the executor was entitled to sell these premises on the 21st December, 1918, notwithstanding the order for administration. There a decree was made in a creditor's suit for the administration of the personal estate of a testator, but no Receiver was appointed, nor any injunction granted to restrain the executrix from dealing with the estate. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank headed, "Emily Gibbons, executrix of Benjamin Gibbons." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. Lord Romilly M.R. held that when a person presents a security to a bank, the banker is bound to search for *lis pendens*,

(1) L. R. 8 Ch. 747.

and, if any is found, then to ascertain the nature of the suit. He said that when this executrix offered security to the bankers they ought to have searched for *lis pendens*. If they had done so they would have found the suit in which the decree had been made and the accounts taken, and that this picture, as part of the assets of the testator, was included in the proceedings. He said that he was therefore of opinion that the claim of a separate and distinct lien upon the picture could not be sustained, and that the picture remained part of the assets of the testator, and that the bankers must come in and prove in the ordinary way. In the Court of Appeal, Sir Wm. James said that it was quite clear to him that the appellants (the bank) must have the value of the picture. He said it appeared that the account opened by the lady was opened as an executorship account, and the bank had no notice of any breach of trust. They afterwards obtained from her, she being both the executrix and universal legatee, the deposit of the picture as security for the balance on that account and for further advances. Further advances were made, and, he says, in his judgment the executrix had a legal right to make such deposit, and in order to deprive the bank of the benefit of it there must be evidence to show that they had notice of there being some breach of trust in the transaction. He said that it appeared to him that the bankers did nothing but what was in the usual course of business, and that there was nothing to fix them with any notice of a breach of trust. The facts in the case bear no resemblance to the facts in the present case; but Mr. Battersby relies upon the statement at the end of the judgment that a mere administration decree, no Receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposal made by her in exercise of those powers, and that, as the order of the Master of the Rolls proceeded entirely on the ground of *lis pendens*, there appeared to be no sufficient reason for sustaining it, and that it must be discharged. It will be seen on examining the facts in this case that the decision did not require the statement made by the learned Lord Justice in such a general form, and I am convinced that he did not intend to lay down an inflexible rule that an executor is at

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liberty to dispose of the assets of a deceased in which creditors or legatees may be interested in such a manner as to deprive the Court of the power of preventing him from doing so after a decree for administration has been made. In any case, I am not laying down any such proposition in this case.

Mr. Justice Romer in *Graham v. Drummond* (1) says:—"I think it is settled law that though an executor who is also residuary legatee sells or mortgages the estate of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the assets, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator." He says the cases showing this are numerous, and of long standing. He refers to the decision of Lord Hardwick in *Nugent v. Gifford* (2), and, he says, to understand that case a fact must be borne in mind which does not appear in the report, namely, that the executor was also residuary legatee. He refers to *Mead v. Lord Orrery* (3), and says that the real ground on which it was decided and is to be supported was that one of the three executors there dealing with the assets was one of the residuary legatees, and that the person dealing in good faith with them was entitled to assume that the executors assented to that asset being treated as part of the residuary share of the legatee. He said that this case was followed by Sir William Grant in *Taylor v. Hawkins* (4), where he pointed out the necessity that the assignee or mortgagee of the asset should have no express notice of the existence of unsatisfied debts of the testator, and he says that the principle has been recognized and followed in *Whale v. Booth* (5) and *Storry v. Walsh* (6). Having disposed of the argument that where the assignment or mortgage only confers an equitable interest in the estate, that equitable interest is subject to the prior equitable right of the unsatisfied creditors, and having said that he does not agree with that argument, and having referred to the cases in which the assets were equitable and not legal, he says (at p. 976): "But in order to prevent misunderstanding, I

(1) [1896] 1 Ch. 968.

(2) 1 Atk. 462.

(3) 3 Atk. 235.

(4) 8 Ves. 209.

(5) 4 T. R. 625n.

(6) 18 Beav. 559.

desire to point out that the cases I have been considering must not be confused with those where an executor has not so far parted with his control over the assets as to prevent his having recourse to it in order to satisfy creditors subsequently appearing. So if the Court administering the testator's estate retains control over an asset it can apply it in favour of creditors at any time notwithstanding that the legatee of the asset may have dealt with it for valuable consideration, for in cases of this class the title acquired by the purchaser from the legatee is really one subject to the right of the executor or the Court, as the case may be, to have the asset applied in satisfaction of any creditors who may appear at any time before the executor, or the Court loses control over it." He refers to a case of *Noble v. Brett* (1), and says that that was a case where the Court held that the executor had not parted with his control over the asset, and had retained his right to have recourse to it to satisfy an unsatisfied creditor; and, further, that the asset had come under the control of the Court for the purpose of administering the estate of the testator. That these were the grounds of the decisions, he says, is shown by the passages in the judgment of Sir John Romilly. He says that *Hooper v. Smartt* (2) was a case where the fund was under the control of the Court in an action administering the estate of the testator, and was subject to the right of the Court to apply it in payment of any creditor who established his claim before it was paid out, and where, though all known debts of the testator had been paid, the purchaser from the legatees had bought, subject to the Court's right, as was pointed out by Vice-Chancellor Hall in these words: "This fund remains in Court, and the purchasers took subject to the risk that other claims might be brought in and established."

I think that these cases establish the rule that the control of the Court is not lost, and may be exercised in appropriate circumstances, and having regard to the requirements of justice, in a case where the executor has diminished or disposed of the assets.

The question in this case, however, as it seems to me, is, in what respect I should exercise my jurisdiction, having regard to the circumstances of this case. Should I exercise it to enable the defendant Thomas O'Brien to get rid of a contract which I hold

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(1) 24 Beav. 499.

(2) 1 Ch. D. 90.

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he made with the plaintiff in this action freely and voluntarily, and with a full appreciation of what he was doing? At the time of the sale the order of the 28th November, 1918, was not operative. I had put a stay on it to enable the defendant to pay the legatee. The conditions of sale provided that my approval of the sale should be obtained; the plaintiff bought subject to that condition. It would be quite open to me, having regard to that condition, to refuse my consent to the sale if I thought that justice required I should do so. I do not think that justice so requires. If it was irregular or improper for the defendant Thomas O'Brien to sell this property, am I to allow him to take advantage of his own irregularity or impropriety for the purpose of defeating what I believe to be the just rights of the plaintiff in this action, and for no other purpose as far as I can see? I can safeguard the interest of the only other person besides the defendant who is interested in this estate. I must decline to assist the defendant in breaking his contract with the plaintiff in this action, and therefore, upon the plaintiff undertaking to lodge the purchase-money in Court in the administration matter, I will approve of the sale and decree specific performance.

I cannot leave out of consideration the circumstance, although perhaps it does not affect the legal question, that I put a stay upon the order for administration in order to enable the defendant O'Brien to raise money to pay off the legacy of the plaintiff in the Chancery suit, and thus dispose of the suit, and it has been stated that he was unable to raise this money on the security of the property, which seems to me to be a somewhat remarkable circumstance; but I cannot see that any injustice was done in the circumstances of this case in the executors selling the premises for the purpose of paying off this legacy, having regard to the fact that one of them—O'Brien—is sole residuary legatee.

As to the Statute of Frauds, having regard to the authorities cited by Mr. Battersby, I am of opinion that the Statute of Frauds has been sufficiently complied with in the memorandum in question. In *Evans v. Hoare* (1), a case where there was a memorandum in writing of an agreement containing the name of the party sought to be charged inserted in some

(1) [1892] 1 Q. B. 593.

part of the memorandum by such party, or his authorized agent, as being a party to the agreement, and such memorandum was presented for signature to the other party, it was held that there was a sufficient signature within sect. 4 of the Statute of Frauds to bind the party sought to be charged.

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In that case the document was a letter signed by the plaintiff as follows:—"Gentlemen—In consideration of your advancing my salary to the sum of £130 per annum, I hereby agree to continue my engagement in your office for three years from and commencing January 1st, 1819, at a salary at the rate of £130 per annum as aforesaid, payable monthly as hitherto." At the top of the letter were written the words "Messrs. Hoare, Mars, & Co., London." The document was drawn up by a person who was authorized by the defendants to draw it up and take it in its present shape for the plaintiff's signature. Mr. Justice Denman said that it appeared to him that the case fell within the principle of the decisions cited in favour of the plaintiff, especially *Schneider v. Norris* (1); *Jones v. Victoria Graving Dock* (2); and *Bleakley v. Smith* (3). He said that if the party sued authorized an agent to lay before the party suing a document containing his name in full as that of the party with whom the contract is to be made, so as to announce to the other party that they are offering him certain terms if he would agree to them in writing, and he thereupon signs; there is sufficient agreement or memorandum thereof signed by a party authorized thereunto within sect. 4 of the Statute of Frauds. Mr. Justice Cave says: "It is suggested on behalf of the defendants that the name of the defendants was only put in to show who the persons were to whom the letter was addressed." He says the answer is that there is the name, and it was inserted by the defendants' agent in a contract which was undoubtedly intended by the defendants to be binding on the plaintiff, and therefore the fact that it was only in the form of an address is immaterial. He then refers to *Schneider v. Norris* (1), a case in which a printed billhead was held to amount to a signature within the meaning of the statute. He said that is a stronger case than the present. The printed heading there was

(1) 2 M. & S. 286.

(2) 2 Q. B. D. 314.

(3) 11 Simon, 150.

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not put into the document for the purpose of constituting a memorandum of the contract, but it was so used with the assent of the party sought to be charged, and it was therefore held to have the effect of a signature. This shows that it is unimportant how the name came to be inserted in a document. In *Johnson v. Dodgson* (1) Lord Abinger said: "The cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it, the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it; but when it is ascertained that he meant to be bound by it as a complete contract the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him."

In the present case Mr. O'Brien, solicitor, has sworn—and his evidence is not contradicted—that, acting as agent for the defendants, he inserted the names of the defendants as the vendors of the property sold. As such agent he inserted the figure at which the property was sold, and the defendants, in my opinion, assented to this, and this document was signed by the plaintiff; and on the authority of the cases I have referred to I must hold that the Statute of Frauds has been sufficiently complied with.

Solicitors for the plaintiff: *McKenzie & Skehan*.

Solicitors for the defendant Thomas O'Brien: *Power & Lewis*.

Solicitor for the defendant Francis Woods: *T. F. O'Brien*.

M. G. K.

(1) 2 M. & W. 653.

IN THE MATTER OF A CONTRACT DATED THE 14TH DAY OF OCTOBER, 1919, FOR THE SALE OF LEASEHOLD LICENSED PREMISES SITUATE IN PATRICK STREET, FERMOY, IN THE COUNTY OF CORK, MADE BETWEEN JAMES ASHE OF THE ONE PART, AND MARY HOGAN OF THE OTHER PART; AND IN THE MATTER OF THE VENDOR AND PURCHASER ACT, 1874.

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March 2, 16.

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(1920. No. 47.)

*Vendor and purchaser—Conditions of sale—No title in accordance therewith—
Possessory title not forced on purchaser—Estoppel.*

Premises held under a lease of 1800 for 999 years, containing covenants against alienation, or user as licensed premises without the landlord's consent, and reserving a rent of £8 reducible to £4 so long as the covenants in the lease were observed, were put up for auction by the vendor. The particulars stated that the reduced rent of £4 had been accepted for many years, but no mention was made of these restrictive covenants. The conditions of sale provided that the title should commence with an assignment of the lease in 1839, and that the sale was made subject to the covenants in the lease. An abstract showing title from 1839 was delivered, whereby it appeared that the landlord had not assented to any of the assignments therein abstracted. The premises had for many years, without the landlord's consent, been sublet to a publican, and were in fact licensed premises. On the purchaser insisting that the landlord's consent to the assignment and to the user of the premises as a publichouse should be obtained, the vendor contended that a good title had been shown according to the conditions of sale. On a vendor and purchaser summons by the vendor, the vendor for the first time claimed to have made a good title under the Statute of Limitations, inasmuch as he and his predecessors had been in possession under assignments which were void under the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154), s. 10, and that such a title could be forced on the purchaser.

Held, that the vendor, having accepted the benefit of the reduced rent of £4, was estopped from denying his liability to the covenants in the lease, and was bound by the covenant against alienation. *Held* further, that the doctrine of *Tichborne v. Weir* (67 L. T. 735) has no application to the right of a lessor to restrain breaches of negative covenants restricting the user of the demised premises, and that the title was not such as could be forced on a purchaser.

Tichborne v. Weir (67 L. T. 735) discussed.

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VENDOR AND PURCHASER SUMMONS for a declaration that the purchaser's requisitions had been sufficiently answered, and that a good title had been made according to the particulars and conditions of sale. The property sold consisted of licensed premises, situated in Patrick Street, Fermoy, and were described in the particulars of sale as held under a lease dated 8th January, 1800, for the term of 999 years at the yearly rent of £8, reducible to £4 provided that the covenants in the lease were complied with. The lease contained a covenant by the lessee not to assign the premises without the landlord's written consent, and also a covenant not to sell wine, spirits, &c., on the premises without the like consent, with a condition of re-entry in the event of a breach of the last-mentioned covenant. There was no right of re-entry on the breach of the covenant against alienation. The particulars of sale described the premises as held under the above-mentioned lease at the rent of £8, but stated that for many years the reduced rent of £4 had been accepted by the landlord. No mention was made of the covenants against alienation and user as a public-house, either in the particulars or conditions of sale. The conditions of sale stated that the premises were sold subject to all the conditions and covenants in the lease, and stipulated that the root of title should be an assignment of the said lease dated the 15th June, 1839. An abstract was duly furnished, tracing the title from the date of the said assignment, and disclosed several assignments of the said leasehold premises, the first of them being made in the year 1862 to a predecessor in title of the vendor. None of these assignments had been made with the consent of the lessor for the time being. The purchaser's first requisition on the abstract was that the vendor should at his own expense procure the consent of the lessor to the assignment to the purchaser. To this requisition the following reply was made:—"The purchaser is precluded by the conditions of sale from making this requisition." There was also a requisition requiring the vendor to procure the consent of the lessor to the user of the premises as licensed premises. The reply was that they had been used as such for many years, and that the lessor was aware of this, and accepted payment of the rent. It was admitted that the landlord's consent could not be obtained.

J. M. Whittaker K.C. (with him *Cennolly*), for the vendor:—

We admit that the landlord's consent cannot be obtained; but the vendor has a good title under the Statute of Limitations, even though there is a covenant against assignment in the lease without the consent of the lessor. If a vendor contracts to give title from a certain instrument and fails, but can give good possessory title from a later date, the latter will be forced on a purchaser: *In re Atkinson and Horsell's Contract* (1). Here we can give a statutory declaration of forty years' possession, and consequently a better title than we contracted to give, for it will be subject to no covenants except to pay rent. As to the covenant not to use as a public-house, this has been absolutely waived, for there has been fifty years' user as such to the knowledge of the landlord: *Hepworth v. Pickles* (2); *Downie v. Somerson* (3). The covenant against alienation provided no remedy by forfeiture, except by action on the covenant, and this lay only against assigns. The vendor is not an assign, for the prior occupier's title was not transferred in 1839, but extinguished: *Tichborne v. Weir* (4). This was followed in *O'Connor v. Foley* (5); *Nisbet and Potts' Contract* (6). Where an assignment is void because made without the lessor's consent the grantee who becomes the occupier is not an assignee of the lessee's interest: *Clifford v. O'Reilly* (7). Therefore the landlord has no right of action against the vendor, and the vendor can convey free from the covenant.

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Norwood K.C. (with him *Hungerford*), for the purchaser:—

The vendor has completely thrown over his own conditions of sale and his title as offered to us in his abstract of title. Now for the first time we are asked to accept a possessory title, which is not as valuable as that for which we contracted. The vendor is estopped from denying that he is bound by the restrictive covenants in the lease; he has accepted the benefit of a reduced rent, and has sold the premises as held by him under the lease; the landlord's consent to the assignment is therefore necessary.

(1) [1912] 2 Ch. 1.

(2) [1900] 1 Ch. 108.

(3) [1900] 1 Ch. 108.

(4) 67 L. T. 735.

(5) [1905] 1 I. R. 1.

(6) [1905] 1 Ch. 391.

(7) I. R. 4 C. L. 218.

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Even assuming that the vendor's title is solely a possessory one, as the disability to assign arises under the statute 23 & 24 Vict. c. 154, s. 10, it attaches to the lands even in the possession of a person who has acquired them under the Statute of Limitations: see *O'Connor v. Foley* (1), where the effect of the statutory disability to assign under 7 Geo. 4, c. 29, was fully considered. This statutory prohibition is independent of contract, and is not affected by the case of *Tichborne v. Weir* (2). In the present case the lease contained no power of re-entry in the case of alienation without consent; the assignment of 1839, with which the title begins, passed the leasehold interest; the next assignment in point of time was made in 1862, and the statutory disability to assign attached to it. We submit that *O'Connor v. Foley* (1) governs this case. *Tichborne v. Weir* (2) was a case of an affirmative covenant, and the occupier was merely an equitable mortgagee who had gone into possession. Restrictive covenants are of a totally distinct character, and attach to the lands in whosoever's possession they may be: see *Tulk v. Moxhay* (3); *In re Nisbet and Potts' Contract* in the Court of Appeal (4). *Clifford v. O'Reilly* (5) does not affect the question, because in that case the assignor had only been in possession for five years.

Finally, this is not the class of case where a purchaser can, in the circumstances, be compelled to accept a title different from the one contracted for.

O'CONNOR M.R.:—

[His Honor having stated the facts as above set out, proceeded:—]

Before the case came into Court the vendor did not recede from the position he took up that the purchaser was precluded by the conditions from requiring that the lessor's consent to the conveyance should be procured. The learned counsel for the vendor saw, however, that that position was not tenable, and he presented an entirely new view of the title. His case was this:

(1) [1906] 1 I. R. 20.

(2) 67 L. T. 735.

(3) 18 L. J. N. S. Ch. 83.

(4) [1906] 1 Ch. 386.

(5) I. R. 4 C. L. 218.

that, owing to the covenant against assignment contained in the lease, there could not be an assignment of the leasehold interest without the consent of the lessor, and that as that consent had not been given to the assignment to the vendor's predecessor in title dated 15th June, 1839, or any subsequent assignment, the vendor did not derive his title from conveyances of the leasehold estate, but from the fact that he and his predecessors had been in possession for a period which gave him title under the Statute of Limitations. He further contended that the estate to which the vendor so became entitled was not the leasehold estate demised by the lease, and that the vendor was free from the restrictive covenant against alienation. He relied upon the decision of *Tichborne v. Weir* (1). It therefore becomes necessary to see what the decision in that case was. The action was brought by a lessor against the defendant as assignee of the lease for damages for breach of a covenant to repair contained in the lease. The defence set up was that the defendant, whose title to possession was under the Statute of Limitations, was not an assignee of the leasehold estate, and therefore not liable on the covenant. The Court of Appeal ruled in favour of that contention, holding that the effect of the statute was not to transfer the estate of the person whose title was barred to the person who got title by possession, but simply to extinguish it. This was the decision of the Court, notwithstanding expressions to the contrary contained in the judgments of very eminent Judges to the effect that the statute operated as a statutory conveyance. It is now argued that the logical consequence of the decision in *Tichborne v. Weir* (1) is that the lessor, who has been in no default, is deprived of his right of action on foot of every covenant in the lease against the person whose title is protected by the lease. This seems a startling conclusion, but still it is one to which we are logically driven, and it may be said that the lessor is in no worse position than if he found that the person in possession was not an assignee of the lease, but was a sub-lessee, who had got a sub-lease from the lessee, who had reserved to himself only a nominal reversion. In such case the sub-lessee, not being in privity with the lessor, could not be sued on a covenant contained in the lease.

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Tichborne v. Weir (1) has been fully discussed in our Courts in *O'Connor v. Foley* (2). There the immediate question was whether a person who had acquired title against a lessee under the Statute of Limitations was bound by a covenant against alienation contained in the lease, the very same question which meets us in the present case. The action was tried by my learned predecessor Sir Andrew Porter, and he followed *Tichborne v. Weir* (1), holding that the person in possession under the statute was not bound by the covenants in the lease, and was consequently free to assign without the consent of the lessor. There were other questions involved, but for my present purpose I need not go into them. An appeal was taken to the Court of Appeal, consisting of FitzGibbon, Walker, and Holmes LJJ. FitzGibbon L.J., while accepting the judgment in *Tichborne v. Weir* (1), showed that it did not apply to the facts of *O'Connor v. Foley* (2). He pointed out that the English Court expressly conceded that the doctrine did not apply when the tenant had estopped himself from denying that he was assignee. Walker L.J. accepted the judgment with the same qualification, but Holmes L.J. thought that the current of authority in Ireland prevented its acceptance. Both FitzGibbon and Walker L.JJ. held that the party in possession by virtue of the statute had estopped himself from denying that he was an assignee of the lease. The fact which in their opinion raised the estoppel was the service on the lessor of a notice to fix a fair rent under the Land Law (Ireland) Acts. Is there any estoppel in the present case? In my opinion there is. The rent reserved by the lease is £8, but there is a proviso therein that on fulfilment of the covenants by the lessee he should not be chargeable with more than £4 as the yearly rent of the premises. Taking advantage of that proviso, the vendor and his predecessors have paid the reduced rent, and it has been accepted by the lessor. In my opinion this raises an estoppel. I think that a person taking advantage of a clause in a lease and deriving benefit under it must accept the burdens. For this reason I am of opinion that the vendor is bound by the covenant against alienation in the lease, and cannot give a valid assignment to the purchaser without the lessor's consent.

(1) 67 L. T. 735.

(2) [1905] 1 I. R. 1; [1906] 1 I. R. 20.

But there is the other element in the case. There is a covenant by the lessee against user of the leasehold premises for the sale of wine, spirits, beer, &c. The property was put up for sale as a public-house in the occupation of a tenant who paid a rent of £24 8s., a rent presumably enhanced by the fact that it issued out of licensed premises. The purchaser required the vendor to procure the consent of the lessor to the user of the premises as a public-house. The reply was that they had been used as such for many years, and that the lessor was aware of the fact, and accepted payment of the rent. That answer may have been sufficient as to the past, but the purchaser wanted assurance as to the future. Consent to what had been previously done did not necessarily cover its continuance. A lessor might extend a favour to an old tenant, and might refuse it to a new. Ultimately the vendor fell back on the conditions of sale; but I can find nothing in them to preclude the purchaser from making the objection. No doubt condition 4 binds the purchaser to admit the performance of the covenants, but that was only down to the date of sale. Condition No. 8, however, affects the purchaser with notice of all the covenants in the lease, and special reliance was placed on it; but I think that as the property was sold as licensed premises—a description which would convey to the mind of any purchaser that he would be entitled to use them as licensed premises—it was incumbent on the vendor to procure the consent of the lessor to such user in the future in the absence of an express provision, such as is generally found in conditions of sale, that the purchaser should himself procure the consent. In any case, the circumstances are such that the Court, in the exercise of the discretion vested in it in actions for specific performance, ought to refuse to give equitable relief.

But here again the vendor shelters himself behind the doctrine of *Tichborne v. Weir* (1). In my opinion, it has no application to the right of a lessor to restrain the breach of a negative covenant restricting the user of the demised premises. *Tichborne v. Weir* (1) was, as I have already shown, a personal action for breach of covenant to repair. FitzGibbon L.J., in *O'Connor v. Foley* (2), was very careful to emphasize that point in order to

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distinguish it from other forms of action which are open to a lessor. There is, for instance, the remedy for the enforcement of negative covenants, which is not, properly speaking, an action on the covenant, but one for the enforcement of an equitable obligation on the owner of lands which had been conveyed to a previous owner, subject to a covenant or condition restricting the modes of user, which in equity runs with the land, and which can be enforced against the owner (even though his title is a possessory one: *In re Nisbet and Potts' Contract* (1)), unless he has the defence of purchaser for value without notice. I refer to the class of action of which *Tulk v. Moxhay* (2), a well-recognized authority, is the leading example. In the present case the purchaser would find himself exposed to the liability of being restrained by injunction from allowing the premises to be used as a public-house—the very purpose for which the purchase was made; and even if he were able to show that he was not an assignee of the lease, there would be no defence. This disposes of the vendor's case; but, although it is not necessary for my decision, I think it advisable to make some observations on counsel's argument for the vendor, which involved the general proposition that a vendor who has failed to show title according to his contract may show that he has a good title under the Statute of Limitations, and force such title upon a purchaser. There is, no doubt, authority for this, but I do not think that it has gone so far as to establish as a universal proposition that when a vendor has contracted to make title in the usual way by conveyances, devises, or descent he can force on a purchaser a title depending entirely on possession. This might place a purchaser in a singularly disadvantageous position. Very frequently a purchaser has to get an advance from his banker or a private lender on the security of the property purchased to enable him to complete the purchase. A banker or private lender might be very ready to lend on the security of a title deduced in the ordinary way, but might absolutely refuse to lend on the security of a mere possessory title. The question is so important that it is well to see how far the authorities go. *Scott v. Nixon* (3) is the first and leading authority. That was a judgment creditor's suit for the administration of the real and

(1) [1905] 1 Ch. 391. (2) 18 L. J. N. S. Ch. 83. (3) 3 Dr. & Warr. 388.

personal estate of a testator who, by his will, had devised specific lands to his eldest son, and devised the residue of his real estate to his younger sons. Subsequently to the date of the will the testator acquired other lands. As the law then stood the will, speaking from its date, did not operate on these lands, and they descended on the testator's heir-at-law. The younger sons, however, went into possession, not merely of the residuary real estate disposed of by the will, but of the subsequently acquired lands as well. They acquired a title to the latter under the 3 & 4 Wm. 4, c. 27. In the suit the heir of the testator was made a defendant, and a decree for sale of the subsequently acquired lands was made. Subsequent to the sale the heir died, and the suit was not revived against the next heir. The purchaser took exception to the title on the ground that the younger children of the testator did not get title under the will, and that as the heir was not before the Court a good legal title could not be given. The answer to this was that they had a good legal title under the 3 & 4 Wm. 4, c. 27, and that the purchaser was bound to take a title under the statute on proper evidence. The case came before Lord St. Leonards on appeal. A perusal of his judgment shows that in his opinion there was no substance in the purchaser's objection, because whether title was in the younger children claiming under the statute, or in the heir-at-law by descent, the purchaser would get a good title in equity, as the suit was by a judgment creditor entitled to sell every part of testator's estate, and all parties, including the heir-at-law, were bound by the decree for sale. Lord St. Leonards found as a fact that the younger children had become entitled under the statute, and that they could give good title, and that the purchaser was bound to accept it. He ends his considered judgment by saying: "A better equitable title there could not be; but the purchaser is not bound to take an equitable title. My opinion, however, is that the title has been by the operation of the statute clothed with the legal estate, and therefore that he is bound to take it." From this it will be seen that the case was a very special one, and can scarcely be cited as authority for the general proposition that a vendor who has contracted to make title according to conditions of sale can disregard the special contract and make title under the Statute of

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Limitations. In *Games v. Bonner* (1) the Court of Appeal appear to have accepted *Scott v. Nixon* (2) as authority for the general proposition that a purchaser is bound to accept a title under the statute, although that was not the title he contracted for. But the question was not in the forefront of the case, and does not appear to have been the subject of argument.

There has been a valuable comment on both these cases by Farwell J. in *In re Nisbet and Potts' Contract* (3). There it was held that a title acquired by adverse possession is not paramount to and does not destroy the equitable right of persons entitled to the benefit of prior restrictive covenants to enforce them against the land. Farwell J. in his judgment deals with the rights of a purchaser to whom a title depending on the Statute of Limitations is offered. He shows that he is still entitled and indeed bound in his own interest to have the title investigated for the full period of forty years, and he quotes the decision of Lord Campbell in *Moullin v. Edmonds* (4), where he held that there was nothing in the Statute of Limitations abridging the period of sixty years then allowed for the investigation of title, and showed the necessity there was for any person taking a possessory title to make a full investigation covering the whole period. Then Farwell J. goes on to say: "It is true that there are cases in which a title depending on the Statute of Limitations has been forced on a purchaser, but they are cases in which a particular objection, apparent on the face of the title as shown, has been held to be covered by possession for the statutory period. Thus, in *Games v. Bonner* (1) an estate tail suggested as an objection to the title was held to be statute-barred, and in *Scott v. Nixon* (2) the possible claim of the heir-at-law of the testator was disposed of in a similar way. But the Court in these cases adjudicated upon the existence of the suggested title; it did not compel the purchaser to take a leap in the dark." From this we may conclude that although Farwell J. recognized that a purchaser may be forced to take a possessory title, it must be in a case which admits of indubitable evidence, and leaves the purchaser subject to no risk. It is also to be observed that in the two cases in which possessory titles were forced on

(1) 54 L. J. Ch. 517.

(2) 3 Dr. & Warr. 388.

(3) [1905] 1 Ch. 391.

(4) 1 D. F. & J. 246.

purchasers, the titles were investigated by the Court and proved by evidence contained in affidavits, the most secure method of investigation which a purchaser could have. But in the present case there does not appear to be any evidence beyond a mere allegation of uninterrupted possession. I may add that in the case of the sale of a leasehold estate, I do not see how a vendor who has contracted to sell it can carry out his contract by offering a title under the Statute of Limitations on the doctrine of *Tichborne v. Weir* (1); the leasehold estate is not vested in him. He cannot then convey it. The most he can convey is the right to hold possession of the lands during the residue of the term. From one point of view that may be a more beneficial estate, because it does not carry with it the personal obligations which the assignee of a leasehold estate assumes; but, on the other hand, not being in privity with the lessor, he does not get the benefits which pass to an assignee of a leasehold estate. For instance, he cannot sue on the lessor's covenants for title and quiet enjoyment which, when not expressed, are implied in leases by the Landlord and Tenant Act, 1860. I give this merely as an example, because there are other rights against lessors which assignees of leases may enforce.

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For the above reasons I must hold that the vendor has not sufficiently answered the requisitions of the purchaser, and has not made out good title in accordance with the particulars and conditions of sale; and I direct that the vendor pay to the purchaser the costs of the application, and also the costs of the investigation of the title, also the sum of £181 5s. paid by the purchaser as a deposit, with interest at 4 per cent. from the date of the deposit, and the further sum of £36 5s. paid by the purchaser for auctioneers' fees.

Solicitor for the plaintiff: *H. F. Chidley.*

Solicitor for the defendant: *Wm. J. Magnier.*

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(1) 67 L. T. 735.

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April 21.

IN THE MATTER OF THE ESTATE OF JAMES BRADY,
DECEASED; MICHAEL BRADY, PLAINTIFF, *v.* ELIZA-
BETH BRADY, DEFENDANT (1).

*Will—Construction—Leaseholds—Renewal—Limited owner—
Constructive trust.*

A testator by his will appointed his wife and brother his executors and trustees, and bequeathed to them certain leasehold premises upon trust to permit his wife to use and enjoy the same and the profits thereof during the residue of the term for the benefit of herself if she should so long live and continue his widow; and the will provided that if the widow should die or marry before the expiration of the term the leasehold premises should be sold, and the proceeds held upon trust for the testator's children as therein provided. The widow alone proved the will, and she acted as sole trustee. The lease expired nine years after the testator's death, whereupon the widow, who had remained in beneficial possession of the leaseholds, and had not re-married, remained on as tenant for three years, and she then obtained a new lease of the premises in her own name.

Held by the Court of Appeal (affirming the decision of Powell J.), that on the true construction of the will the widow was in possession under the former lease as tenant for life only, and that the new lease was a graft upon the old one.

APPEAL.

James Brady, formerly of Terenure, Co. Dublin, made his last will, dated the 4th April, 1892, by which he appointed his wife, the above-named defendant Elizabeth Brady, and Patrick Brady his executors and trustees, and guardians of his minor children. The testator bequeathed to his said wife an immediate legacy of £100, and also the stock-in-trade, household furniture, goods, chattels, and effects in his licensed dwelling-house and premises known as "The Hotel," situate at Terenure, Co. Dublin. He bequeathed certain leasehold premises in North King Street, Dublin, to his trustees upon trust for his children as therein provided, and the will then continued as follows:—"I bequeath the licensed dwelling-house and premises known as 'The Hotel,'

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., and
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held under a lease for an unexpired term of years, situate at Terenure aforesaid, to the said trustees for the residue of the said term upon trust to permit my said wife to use and enjoy the same and the profits thereof during the residue of the said term for the benefit of herself, subject to the payment of the rent payable thereout if my said wife shall so long live and continue my widow, provided always that if she shall die or marry before the expiration of the said term, then and in such case I direct the said trustees to sell the same, and hold the proceeds upon the same trust and with and subject to the same powers and provisions as are hereinafter declared in respect of the children's trust fund, provided always that if my eldest son Thomas shall at the time my said wife shall so die or marry again have attained the age of twenty-five years, then, and in such case, I authorize the said trustees in case they shall think fit to assign the said licensed dwelling-house and premises to my said son absolutely." After divers other dispositions, the testator bequeathed all the residue of his property to his trustees, upon trust, to form a "children's trust fund," in which the plaintiff, as one of the surviving children of the testator, was substantially interested.

The testator died on the 23rd August, 1892, and his will was proved by the widow, who alone acted in the trusts of the will.

The testator's eldest son Thomas died a bachelor and intestate on the 18th January, 1906.

The lease of the hotel premises at Terenure expired on the 1st May, 1901. The testator's widow, who had not re-married, and who had been in beneficial possession of the leasehold premises at Terenure from the date of the testator's death, remained on as tenant after the expiration of the lease, and on the 27th May, 1904, she obtained from the landlord a new lease of the premises in her own name for a term of 99 years from the 1st May, 1903, on payment of a fine of £2,000, subject to the yearly rent of £30.

On the 5th September, 1919, the widow put up the said leasehold premises at Terenure for sale by public auction, and they were sold to a purchaser for a sum of £8,300. The assignment to the purchaser was executed by the widow "as beneficial owner." On the 6th October, 1919, the present summons was instituted by the plaintiff, a son of the deceased testator, seeking an order that

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the trusts of the will should be carried into execution, and, if necessary, for the administration of the real and personal estate of the deceased. A number of difficulties arose in the administration of the estate, but the case is reported solely on the question whether the said lease of the 27th May, 1904, was a graft upon the former lease comprised in the will.

By an order made on the 11th December, 1919, Mr. Justice Powell directed that the trusts of the will of the said James Brady ought to be performed and carried into execution, and the said order (*inter alia*) declared "that upon the true construction of the said will and in the events which happened, the defendant became entitled until her death or re-marriage only to the said premises at Terenure and the proceeds of the sale thereof, and that subject to such her interest, and her right (if any) to recoupment out of the said proceeds in respect of any sums paid by her out of her own moneys by way of fine or in connexion with the re-building, repairing, and equipping of the said premises and to payment of the costs of and incident to the said sale, the said proceeds form part of the 'children's fund' in the said will mentioned," and an inquiry was directed as to what sums were so paid or expended by defendant, and she was by the said order directed forthwith to lodge in Court to the credit of the suit the said sum of £8,300.

The defendant appealed to the Court of Appeal against the latter portion of this order.

Poole (J. M. Whitaker K.C. with him), for the appellant:—

We in no way challenge the principle of graft, as expounded in *Biss v. Biss* (1); but we say that it has no application in this case. Here the testator, with a view to making a provision for his widow, bequeathed to her the entire residue of the lease absolutely, for her own benefit (the bequest being in strong contrast with that of the North King Street premises, in which the widow took no beneficial interest whatsoever), this absolute bequest being defeasible only in one of two events, namely, the death of the widow prior to the expiration of the term, or her re-marriage within that period. As neither of these events has happened, the absolute interest given to the widow remained

unimpaired, and she was free to bargain for and obtain a new lease for her own benefit, and unaffected by any of the trusts of the will. In *Rawe v. Chichester* (1) and in *James v. Dean* (2), relied on by the respondent, the testator's widow was in each case expressly given a life estate, and no more; and no reported case can be referred to in which the gift of an absolute interest in a lease, with an executory gift over on the happening of a certain event, which executory gift failed, was held to confer such a limited interest in the lease as to attract the doctrine of graft in the event of a new lease being obtained by the absolute owner. The absolute gift to the widow of the stock-in-trade and chattels in the house strengthens our contention.

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G. Fetherstonhaugh K.C. and *Chadwick*, for the respondent:—

The appellant was under every disability which could prevent her from claiming the new lease for her own exclusive benefit. She was the executrix of her husband's will, and the sole acting trustee, and the former lease was bequeathed to her as trustee. Further, on the true construction of the will she was, during the entire residue of the term, a tenant for life, and nothing more. Her occupation was referable to her tenancy for life, and she could only have sold the premises under her Settled Land Act powers as tenant for life. At no moment of time was she absolute owner of the lease, and her position was exactly the same as that of any person who is made tenant for life of a terminable lease. Every such person, if he outlives the lease, is entitled to the enjoyment of the entire residue of the term, but he is not absolute owner. If we are right in this contention, it must be admitted that the ordinary doctrine of graft applies: *Rawe v. Chichester* (1); *James v. Dean* (2); *Egan v. Stack* (3); *Biss v. Biss* (4); Co. Litt., vol. i, 42 (a).

Poole, in reply:—

That the appellant was an executrix and trustee is immaterial. She had assented to the bequest to herself, and she was, in the events which happened, a trustee for herself absolutely.

(1) Ambl. 715.

(2) 11 Vesey, 383.

(3) 5 L. R. Ir. 633.

(4) [1903] 2 Ch. 40.

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SIR JAMES CAMPBELL C.:—

We do not see our way to differ from the decision of Mr. Justice Powell in this case. The testator was possessed of a valuable leasehold interest in these premises at Terenure, which he disposed of by his will in the following terms:—[His Lordship read the clause in question, and continued:—] It seems to me difficult to imagine more apt words for the purpose of conferring upon his widow a life interest in the residue of the term. The testator has omitted to make any provision for the possibility of a renewal of the lease being obtained; but if his true intent and meaning was that his widow was to have a life interest only in the residue of the original term remaining unexpired on his death, then, notwithstanding that she outlived the lease, she was necessarily during the entire period of her enjoyment of the lease in the position of a limited owner only, in addition to being the executor and trustee under the will; and when, owing to her position as such, she obtained a renewal of the lease in her own name, the new lease must be deemed to be a graft upon the former one, and it is impossible for the widow to contend that she is entitled to the benefit of the new lease unaffected by the trusts of the will.

The words used by the testator lead inevitably to the conclusion that he intended to confer upon his widow a life estate only and nothing more, and, that being so, the decision of Mr. Justice Powell was, in my judgment, correct, and the appeal must be dismissed with costs.

RONAN L.J.—I agree.

O'CONNOR L.J.—What Mr. Poole in effect asks us to decide is that this will is to be read as conferring upon the appellant a conditional gift of an absolute interest in the term of years remaining unexpired after the testator's death; in other words, Mr. Poole construes the will as if the clause in question commenced with the words: "If my wife shall live to the first day of May, 1901, and shall not re-marry within that period, I bequeath to her the entire interest in my leasehold premises at Terenure."

In my opinion that is not the true construction of the will. I shall not repeat the words of the will, but, in my judgment, these words conferred upon the appellant only a defeasible life interest in the term. The result is that the new term is a graft upon the old one, and is affected by the same trusts. I agree that the decision of Mr. Justice Powell must be affirmed.

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Solicitor for the appellant: *Thomas J. McGrath.*

Solicitors for the respondent: *Lett & Fetherstonhaugh.*

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Powell J. FRANCES ROONEY AND HENRY ROONEY *v.* THE
 1919. DEPARTMENT OF AGRICULTURE AND TECH-
 July 17, 18. NICAL INSTRUCTION FOR IRELAND. (No. 2.)
 Oct. 28.
 (1919. No. 428.)

*War—Crown—Defence of the Realm—Right of Crown to take possession of
 land without compensation—Defence of the Realm Act (5 Geo. 5, c. 8)—
 Regulation 2 L.*

Lands were compulsorily acquired by the defendants for the maintenance of food supply under Regulation 2 L of the Defence of the Realm Act (5 Geo. 5, c. 8), which lands were at the time sublet in conacre. In an action brought by the owners of the lands for a declaration that they were entitled to compensation from the defendants, and for an order for the assessment and payment of such compensation:

Held, that the plaintiffs were entitled to compensation, and to an inquiry in chambers to assess such compensation.

TRIAL OF ACTION.

The plaintiffs were the owners in fee-simple of certain lands containing 7 acres 3 roods and 2 perches, and 6 acres 2 roods and 10 perches respectively, situated near Cabra, in the City of Dublin, all of which had been let under conacre lettings for eleven months from 1st February, 1918, for lairages for sheep and cattle, and for dairying purposes.

The plaintiffs by their statement of claim alleged that the defendants and certain persons purporting to act under the authorization of the defendants entered on and proceeded to applot and break up the lands, and excluded the plaintiffs and their licensees, and remained, and still were in occupation of same, and refused to pay any compensation for damages for the user and occupation of same; and the plaintiffs claimed a declaration that they were entitled to compensation from the defendants, and that all necessary orders should be given for the assessment and payment of such compensation.

The defendants by their defence relied upon the provisions of the Defence of the Realm Act (5 Geo. 5, c. 8), and of regulation 2 L made thereunder (1).

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Jellett K.C., Healy K.C., and E. J. Kelly, for the plaintiffs.

Serjeant Matheson K.C., De Renzy, K.C., W. E. Wylie K.C., and Ryland, for the defendants.

POWELL J. :—

Oct. 28.

On the 25th of March, 1918, the plaintiff, Frances Rooney, caused a writ to be issued in the Court of the Master of the Rolls against the defendants in this action, claiming a declaration that an order made by the defendants in or about the month of March, 1918, authorizing the entry of the Corporation of the City of Dublin or other persons on these lands was void and unlawful and ultra vires, and for an injunction to restrain the defendants from enabling any persons purporting to act under their authority to break up, plot, or divide the lands.

That action came on for hearing before the Master of the Rolls in December, 1918(2). He said that the only question he had to decide in that action was whether the defendants had acted and were continuing to act illegally in taking and retaining

(1) Regulation 2 L 8 (ii) provides : Where the Department of Agriculture and Technical Instruction for Ireland are of opinion that, with a view to increasing the production of food in the country, it is expedient that they should exercise the powers given to them under this regulation as respects any land, the Department may enter on and take possession of the land (a) . . . (b) . . . (c) . . . without any consent, if the land is situated in or near a town to which the Towns Improvement (Ireland) Act, 1854, or any part thereof applies, or an urban district, and the Department are of opinion that in order to provide necessary food for residents in the locality, land, in or near that town or district, is immediately required for the purpose of being cultivated in allotments, and that the use of the land for that purpose is unreasonably withheld . . . and cultivate the land . . . or arrange for its cultivation or use as aforesaid, by any person in such manner and upon such terms and conditions as the Department may direct. (vi) Sub-s. (4) shall not apply. (Note: Sub-s. 4 provides for the determination of compensation by an arbitrator.)

(2) [1919] 1 I. R. 302.

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possession of the plaintiff's lands. He referred to the power conferred on the defendants by sect. 2, sub-s. 8, of the Defence of the Realm Regulations, and he found that the Department had formed and expressed the opinions mentioned in that section, and the sub-sects. applicable, and that those opinions were pronounced in the only way in which Departments of State could pronounce an opinion, and he held that he had no power to overrule them. He also referred to the difference between the law in England and that in Ireland with regard to the matters in question, and to the fact that as regards England the occupier was given a right to compensation, but that as regards the Irish sub-section no right to compensation was given. He said that he was not at all clear that the plaintiff was not legally entitled to compensation for the compulsory taking of her lands, although he had not formed any final opinion on the point. He pointed out, however, that it was not an action for a declaration that the plaintiff was entitled to compensation, but was an action for an injunction, and stated that he had no course open to him but to dismiss it.

The plaintiff appealed to the Court of Appeal. Mr. Healy and Mr. Jellett, on behalf of the plaintiff, contended that the Regulation as made applicable to Ireland was invalid and ultra vires. They pointed out that sub-s. 4 of Regulation 2 L, which provides for compensation, was, by sect. 8, sub-s. 3, made inapplicable to Ireland, and submitted that this amounted to a provision that lands might be acquired without compensation, and that any such regulation was ultra vires and void.

Serjeant Matheson, who appeared for the defendants, stated that he did not contend that the existing right to compensation, if such there be, was taken away by the regulation.

The Lord Chancellor said, at p. 308: "It has next been strenuously argued that the effect of these regulations, in the form in which they were made applicable to Ireland, is to destroy any existing right to compensation which might otherwise have been vested in the plaintiff. This contention is based upon the deliberate omission from the regulations as made applicable to Ireland of clause 2 L.(4), which, in the application of the regulation to England, provides for compensation being paid at a definite time and by a particular tribunal to any person injuriously

affected by the exercise of the powers under the regulation. Mr. Healy and Mr. Jellett have contended that this omission amounts to a negation of any right to compensation in the case of acquisition of any land under this regulation in Ireland. We are all of opinion that the omission has not this effect. If it had, the question would arise whether, as has been contended by Mr. Jellett, the regulation is ultra vires or not; but as we are of opinion that the right, if any, to compensation is not taken away, it is unnecessary for us to express an opinion upon this point, nor does the decision in *de Keyser's Case* (1), to which we have been referred during the argument, affect the matter. The action is not one seeking a declaration that the plaintiff is entitled to compensation at common law or otherwise; it is merely an anticipatory action to prevent a threatened trespass, and inasmuch as we are of opinion that any existing right to compensation on the part of the plaintiff in respect of the entry upon her lands, and any consequent injury thereto, is not taken away or negatived by this regulation, and as Serjeant Matheson, on behalf of the defendants, has so admitted, we must affirm the decision of the Master of the Rolls."

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The matters which I have to determine, therefore, in the present action are: 1, whether the plaintiffs are entitled to compensation, and 2, if they are entitled to compensation, what is the proper procedure for assessing it.

The case was fully heard and ably argued on both sides at the end of the last sittings. I was told that upon the final determination of the questions other cases depended of a like nature, and I have in the meantime considered the case as carefully as I could.

[The learned Judge referred to the evidence given at the trial by the plaintiff Frances Rooney, and proceeded:—]

Mr. Healy, in a very forcible and able argument, laid great stress upon what he described as the hardship which was inflicted upon the plaintiff Henry Rooney, whose sole means of subsistence was taken from him without compensation at a time when he, although little more than a boy, was serving his country at the risk of his life; and he pointed out with great force that this valuable property had been treated by the defendants in a manner

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which caused irreparable damage. I will content myself with repeating the language of the Lord Chancellor in his judgment in the injunction action, in which he said that it was probable that this was a somewhat extreme case in which to apply compulsory powers, having regard to the fact that these were valuable pasture lands, which might be seriously damaged if devoted to tillage purposes; but these considerations, striking as they are, cannot, of course, be taken into account in deciding what is, after all, a pure question of law.

It appears to me that if the contention of defendants' counsel be right—that this young man is not entitled to any compensation for his loss—it is, to use the words of an eminent Judge in a case to which I shall refer later on, a startling proposition.

Are the plaintiffs entitled to compensation?

Sect. 1, sub-s. 1, of the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), provides that His Majesty in Council has power during the continuance of the present war to issue regulations (inter alia) for securing public safety and the defence of the realm. A vast number of regulations have been issued in pursuance of this Act and of several amending Acts. The first regulation, issued in November, 1914, commences as follows:—
“The ordinary avocations of life and the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the realm.”

The particular regulation relied upon in this action by the defendants is Regulation 2 L, which relates to the powers of entry on and cultivation of land for maintenance of food supply in England, Scotland, and Ireland. [The learned Judge read the material clauses of Regulation 2 L, and proceeded:—] It will be observed that although the provisions of sub-s. 3 of 2 L, providing for compensation to any person who cultivates or uses land under any arrangement which the Board of Agriculture and Fisheries in England, the Board of Agriculture in Scotland, and the Department of Agriculture and Technical Instruction for Ireland, is or are entitled to make, would seem to apply to Ireland, yet the compensation which, under sub-s. 4, is payable in England and Scotland to the person injuriously affected by the exercise of

the powers under the regulation, is made inapplicable to Ireland. But the Court of Appeal have, as I have pointed out, decided, in the words of *Ronan L.J.*, that the regulation excluding Ireland from the clauses referred to does not amount to anything in the nature of a repeal of a right to compensation, if such exists.

The principal authorities dealing with this subject, and which have been discussed at the Bar in this case, are *In the Matter of a Petition of Right* (1); *Cannon Brewery Co. v. Central Control Board (Liquor Traffic)* (2); and *de Keyser's Royal Hotel, Ltd., v. The King* (3). None of these cases is directly in point, because the decisions were upon sections and regulations with which we are not concerned in this case; but in at any rate two of the cases certain principles have been laid down which in my opinion govern this case.

The first of these cases, *In the Matter of a Petition of Right* (1), was tried before *Avory J.* without a jury in June, 1915. In December, 1914, the military authorities had taken and entered into possession of certain lands and buildings belonging to and occupied by the suppliants for the purpose of an aviation ground or aerodrome. The Judge found as a fact upon the evidence and admissions that the possession and occupation of the lands and premises in question was, in the opinion of the competent naval and military authorities, necessary for securing the public safety and the defence of the realm, and that such possession and occupation was not intended to be of a permanent character, but only for such time as might be required by the exigencies of the recent war. The suppliants claimed a declaration that they were lawfully entitled under the Defence of the Realm Act, 1842, or under the Military Lands Act, 1892, or other Acts amending the same, to proper compensation in respect of the lands. The Attorney-General, on behalf of the Crown, replied that possession of the land was taken by virtue of His Majesty's Royal prerogative, and by virtue of the powers of the Defence of the Realm (Consolidation) Act, 1914, and of the regulations issued thereunder on November 28th, 1914, and denied that compensation was by law payable to the suppliants under the Act of 1842 or the Act of 1892, or any Act amending the same, or at all.

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It will be observed that the question of His Majesty's prerogative was raised by the Crown in addition to the questions arising under the Defence of the Realm Acts and the regulations. On the question of His Majesty's Royal prerogative, Mr. Justice Avory referred to the well-known case of *The King v. Hampden* (1) (the Ship Money Case), decided in 1637, and to the *Saltpetre Case* (2), decided in 1606, and to the dictum of Willes J. in *Hole v. Barlow* (3), decided in 1858; and dealing with the contention of Mr. Leslie Scott, the suppliants' counsel, that the taking possession of the land of the subject under the prerogative for the purpose of defence only applied when the enemy had come against the realm to the sea-coast, expressed the view that if the exercise of the prerogative was to be limited to that condition of affairs the changed conditions of modern warfare should be taken into account, and that the realm now required protection from enemy aircraft and long-range guns of enemy ships, as in the old days it required protection from the land and enemy troops; and that when the lands in question had been taken there had been an actual bombardment of the coast by ships of the enemy; and he came to the conclusion that His Majesty by virtue of his prerogative and through his rights was, in the then existing circumstances, entitled to take possession of the lands and premises in question, and to occupy same without making any compensation, and he came to that conclusion also on the assumption that the case was governed by statute law alone. He was of opinion that Regulation No. 2 conferred upon the competent naval and military authority during the continuance of the war an absolute and unconditional power to take possession of lands or buildings, and to do any other act involving interference with private property where, for the purpose of securing the public safety or the defence of the realm, it was necessary so to do, and that the enactment impliedly repealed for the time being any right to or liability to pay compensation if it existed in time of war under the earlier Acts; and he came to the conclusion therefore that the suppliants had failed to establish any right in law to compensation in the circumstances of the case, but added that they

(1) 3 Howell's State Trials, 825.

(2) 12 Rep. 12.

(3) 4 C. B. N. S. 334.

were in his opinion entitled to apply to the Commissioners under the Royal Commission of Inquiry, dated March 31st, 1915, for compensation in respect of any direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the circumstances of the case. This judgment was affirmed by the Court of Appeal.

Lord Justice Warrington put the prerogative right as "the right to take and use the lands for so long and in such manner as may be necessary for securing public safety and the defence of the realm during the present war."

I do not think that the decision in this case is an authority in favour of the defendants here. I think this is apparent from an examination of the judgment of Lord Cozens-Hardy. The learned Master of the Rolls deals first with the question of the Royal prerogative. He points out that the existence of the prerogative was not challenged by counsel for the suppliants, but that it was sought to limit it to a case of actual invasion; and he says that in his opinion there is no foundation for the limitation, and that the prerogative applies to what is reasonably necessary for preventing and repelling invasion at the present time, regard being had to the invention of gunpowder and the use of aeroplanes in warfare; and he points out that the Act of 1842 relied upon by counsel for the suppliants, which recognizes the legal right of persons whose lands are taken to compensation to be fixed by the Courts in the ordinary way, in no way affects the prerogative right at common law. He then considers the effect of the Defence of the Realm Act, 1914, and the regulations made thereunder applicable to the case before the Court. He points out that sect. 1 expressly mentions certain acts altogether outside any prerogative right, and that sub-sect. 2 says that any such regulation may provide for the suspension of any restriction on the acquisition or user of land, or the exercise of the power of making by-laws, or any other powers under the Defence Acts, 1842 to 1875; and he refers to Regulation 2, which expressly authorizes the competent naval and military authorities, where, for the purpose of securing the public safety or the defence of the realm, it is necessary to do so (*inter alia*), to take possession of any land and construct military works thereon, to take possession of buildings or other property, or to

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do any other act involving interference with private rights of property which is necessary for the purpose aforesaid. He points out that there is no provision for compensation in respect of any act done in exercise of these particular powers, although there is mention of compensation in section 7, which deals with a different subject-matter, viz., manufacturing arms, munitions, food, forage, and stores; and he says that in his opinion the language of the statute and of the regulations made thereunder plainly justifies what the Crown had done in the case before him, and that the words in sect. 1, sub-s. 2, of the Act authorized the suspension of any restrictions on the acquisition of land, one of which was the necessity of paying compensation.

In the present case the defendants do not justify, either in the pleadings, or, as far as I can gather, in the arguments, the taking or holding of the plaintiffs' lands without liability to pay compensation by virtue of the Royal prerogative. They claim under the statute and the regulations, which they say constitute their authority, and therefore, of course, they could not justify under the Royal prerogative, assuming it to extend to the acts done here; and, having regard to the observations of Swinfen-Eady M.R. in his judgment in the *de Keyser Case* (1), I do not think it would so extend; and this is pointed out by Lord Justice Warrington in the *de Keyser Case* (1), when he says that where complete and sufficient statutory powers are conferred, the prerogative is merged therein. Indeed, I think that the decision of the Court of Appeal in the *Petition of Right* case, so far as it depends upon a consideration of the statute and the regulations, is in favour of the plaintiffs in this case. Lord Cozens-Hardy points out that in the section of the Act and the regulations made thereunder which he was considering, providing as they do authority to the competent naval and military authorities to take steps for the purpose of securing the public safety or the defence of the realm, no provision for compensation is made; and he draws attention to the language of these sections and regulations as compared with regulation 7, in which, when dealing with a different subject-matter, there is mention of compensation.

In looking at the regulation in the present case, 2 L, which

deals with a different subject-matter, namely, the power of entry on and cultivation of land for the maintenance of the food supply, it will be found that with one exception—a very important exception, no doubt—provision is made for compensation to be paid to any person injuriously affected by the exercise of the powers in the regulation. Therefore, I think one is entitled to say that the principle of compensation being payable to persons injuriously affected by the exercise of the powers conferred by Regulation 2L is recognized, and that therefore the right of compensation exists in respect of these particular acts. The particular sub-section which provides for this compensation, viz., sub-s. 4, no doubt is declared by sect. 8, clause 6, not to be applicable to Ireland; but again I refer to the fact that the Court of Appeal in this country have held that the existing right to compensation, if such there be, is not taken away by the regulation declaring that sub-s. 4 is not applicable to Ireland. Therefore, I think that the decision of the Court of Appeal in England in the *Petition of Right* case, drawing the distinction which it does between the case under its consideration, in which compensation is not provided for, and the case in which compensation is provided for, is a decision in favour of the plaintiffs in this case, because compensation is provided for in this case in favour of persons who are injuriously affected by the acts done under the regulation in question in this action. I am bound, however, to say that, having regard to the judgments of the Court of Appeal in England in the *de Keyser Hotel Case* (1), and in particular the judgment of Lord Justice Warrington, who was a member of the Court in the *Petition of Right* case, the decision in the latter case does not appear now to be authoritative.

I now come to consider the case of the *Cannon Brewery Company v. Central Control Board (Liquor Traffic)* (2), which was much relied upon in this case by Mr. Healy. It was held by Younger J. that, on the principle stated in *Reg. v. Abbott* (3), *Commissioners of Public Works (Cape Colony) v. Logan* (4), and *Attorney-General v. Horner* (5), acquisition “compulsorily or by agreement” in sect. 1, sub-s. 2 (b), of the Act of 1915 and Regulation 6, involved payment, and

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(1) [1919] 2 Ch. 197.

(3) [1897] 2 I. R. 362.

(2) [1918] 2 Ch. 101.

(4) [1903] A. C. 355

(5) [1884] 14 Q. B. D. 245.

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that the Lands Clauses Act must be taken to be incorporated in the Act of 1915, that Act and the regulations constituting "the special Act," and the "undertaking" being the control or monopoly in the national interest of the sale and supply of excisable liquors within the prescribed area, of which "undertaking" the defendants were "promoters." The Court of Appeal, affirming the decision of Younger J., held that the plaintiffs had a legal claim to be paid compensation in respect of the premises compulsorily acquired by the defendants, and also affirming the decision of Younger J. (Bankes L.J. dissenting), that the plaintiffs were entitled to have such compensation assessed under the Lands Clauses Acts.

In the case under consideration the defendants were constituted the prescribed Government authority, with power to sue and be sued, and the Board was given, by various regulations and sub-heads to these regulations, various powers for the purpose of the control of the sale and supply of intoxicating liquor in any area. The Board on entering paid the tenant for his stock, which they took over, and negotiations followed between them and the plaintiff company as to the compensation which the plaintiffs were entitled to receive. The view of the plaintiff company was that they were entitled to compensation for their property assessed under the Lands Clauses Act. The view of the defendant Board was that the plaintiffs were only entitled to such compensation as might be awarded them in accordance with the recommendation of the Royal Commission, which was appointed on August 2nd, 1915, under His Majesty's Royal Sign Manual, to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid out of public funds to applicants residing or carrying on business in the United Kingdom in respect of direct and substantial losses incurred by them by reason of interference with their property or business through the exercise by the prescribed Government authority of its powers under the Defence of the Realm (Amendment) (No. 3) Act, 1915.

Mr. Justice Younger, in his judgment, pointed out that the existence of the Commission referred to gave the plaintiffs, and others in a similar position, no rights or advantages which might

not at any moment be withdrawn, and he said that the claim of right made in the action was therefore not only of great importance to the plaintiffs themselves, but of wide general interest. He referred to the Irish case of *The Queen v. Abbott* (1), and to the judgment of Mr. Justice Gibson in that case, who said: "No doubt the Defence Act is of national importance, and *salus populi suprema lex*. But the safety of the State is best secured by a general average contribution, and not by making jettison of individual interests." And Younger J. says: "I agree with these words, which, as applied to the case in hand, are a very moderate statement of the position." He also referred to *The Commissioner of Public Works (Cape Colony) v. Logan* (2) and to Lord Davey's judgment, in which he sets forth the principle clearly in these words: "But their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Railway Company v. Windsor and Annapolis Railway Company*" (3). The second is the case of *Attorney-General v. Horner* (4), where Brett M.R. said:—"Now it is to be observed that if those acts have taken away and interfered with such rights, they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them; but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so." And the learned Judge says: "I feel no doubt that the power to take compulsorily or by agreement, whether subject to mortgage or free from mortgage,

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(1) [1897] 2 I. R. 362.

(2) [1903] A. C. 355.

(3) 7 A. C. 178.

(4) 14 Q. B. D. 245.

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necessarily involves payment for what is taken." He then deals with the question as to the method of obtaining payment, which I shall refer to later on. Swinfen-Eady M.R., in his judgment, says: "No intention can be attributed to Parliament of taking away from individuals their property without paying them for it, unless such intention be expressed in clear and unequivocal language. It may often be in the interests of the State that the particular property of individuals should be taken, either temporarily or permanently, for the State; but it is difficult to appreciate why in such cases (i.e., temporarily or permanently) the cost or expense should not justly fall on the State, for whose benefit it is taken, and not on the individual owner." The learned Master of the Rolls also deals very fully with the suggestion of the defendants that the only right of the plaintiffs was to such compensation as might be awarded out of public moneys as a matter of grace by the Royal Commission. He says that this amounts to a contention that the plaintiffs had not any legal right to compensation, and that the proposition was a startling one. He refers to the terms of the Commission, dated August 2nd, 1915, and to other commissions brought into existence for the like purpose, and he says that the views adopted by the Defence of the Realm Losses Commission as to their position and duties, and which have been continually adopted and acted upon by them, appear in the very first report—namely, that having regard to the terms of their appointment, they had declined to consider any application which was otherwise provided for, in the sense that the applicant had or claimed to have any rights enforceable in a court of law under any statutory enactment, or under any agreement to which the Crown was a party. And he says that the Commission does not purport to deal with legal claims, but only with the claims of persons who admit that they have not any legal rights, or who waive them if they exist, and who endeavoured to make out a case for the favourable consideration of the bounty of the Crown, and that they do not proceed upon any legal basis, or deal with claims upon a legal footing, and that the Commission does not purport to be a Court for deciding any legal claims, and that the argument of the Solicitor-General that the only procedure open to the plaintiffs is to prefer a claim before the Commission amounts to a denial that the plaintiffs have any legal claim.

Bankes L.J., although he did not agree with the judgments of Younger J., or of the other members of the Court of Appeal, that the Lands Clauses Act applied, agreed with the Court below and his colleagues that the plaintiffs were entitled to compensation, and in reference to the contention that their only remedy was an application to the Commission, he says: "The respondents claimed a recognition of their legal and statutory right. They were offered the opportunity of applying for an *ex gratia* payment. They claimed a decision which they could enforce in a Court of law; they were offered a report to His Majesty's Treasury. Well might the respondents say that they asked for bread and were given a stone." Eve J., in his judgment, says: "It is not, of course, denied that it would be competent for the Legislature to enact that the acquisition by the State of the property of an individual should give no legal right to any payment for the same, and that the individual should be left to obtain such compensation (if any) as the State should think fit to award him; but it has been strenuously argued that the intent, if it exists, to make so serious an encroachment on individual rights must be expressed in the plainest and most unequivocal language, and must not be left to be gathered from the assembling together of a patchwork of legislation contained in Acts of Parliament, amending Acts, regulations thereunder, and Orders in Council, and by extracting sections and clauses here and there, and comparing the dates of the respective enactments, thereby arriving at the conclusion that there are some grounds for accepting the view that such a result may have been intended." And, in addition to the cases referred to by the other members of the Court, he refers to the observations of Bowen L.J. in *London and North-Western Railway Co. v. Evans* (1), where he says: "The Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. It is a doctrine of sound sense and obvious justice, to be borne in mind in dealing with legislation, which cannot be supposed, unless it so explicitly states, to neglect what

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(1) [1893] 1 Ch. 16.

Powell J. is natural justice." *Eve J.* further says: "The Act, as I have
1919. already pointed out, makes no mention of compensation; on the
ROONEY other hand, it certainly contains nothing to support the view that
v. property can be compulsorily acquired thereunder without com-
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presumption? I think not. On the contrary, I think the pro-
vision authorizing the acquisition compulsorily or by agreement
leads irresistibly to the conclusion that compensation is to be
paid, whichever mode of acquisition is resorted to. From this it
results that the compulsory acquisition of premises pursuant to
the Act gives the owner a legal right to compensation, and, as the
possession of that right disqualifies him as an applicant for com-
pensation under the Commission, in that his case is 'otherwise
provided for,' the final question which emerges is, how is such
compensation to be ascertained?" The learned Judge then
deals with the application to the case before him of the Lands
Clauses Consolidation Act, 1845, to which I shall address myself
later on.

It will be observed that in this case neither the statute, the
Defence of the Realm (Liquor Control) (Amendment) No. 3 Act,
1915, nor the regulations made in pursuance of it, provide for
compensation to be paid by the Department, the prescribed
Government authority to carry out the provisions of the statute
and regulations; and yet *Mr. Justice Younger* and all the
members of the Court of Appeal held that the plaintiff was
entitled to compensation on the principle, deduced from many
authorities, and so clearly stated by *Swinfen-Eady M.R.*, that
although it may be in the interests of the State that the parti-
cular property of individuals should be taken, either temporarily
or permanently, for the State, the cost or expense should fall on
the State, for whose benefit it was taken, and not on the indivi-
dual owner; and, secondly, that where this right to compensation
exists, the individual whose lands are so taken is not compelled
to resort to a tribunal—the Royal Commission—which does not
purport to deal with legal claims, but only with the claims of
persons who either admit that they have no legal rights, or have
waived them. I think the present case is a *fortiori*, because

Regulation 2 L itself provides for compensation to be paid by a Board which is, as respects the carrying out of the regulation, the prescribed Government authority, to any person injuriously affected by the exercise of the powers under the regulation, and if, as Lord Davey put it in *Commissioner of Public Works (Cape Colony) v. Logan* (1), the intention should not be imputed to the Legislature to take away a man's property without compensation unless such intention be expressed in unequivocal terms, how am I entitled to hold that because the particular clause which provides for the method of ascertaining the amount of compensation to be awarded for the injury done is not made applicable to Ireland the Legislature has expressed in unequivocal terms the intention that in Ireland a man's property may be taken without any compensation?

de Keyser's Royal Hotel, Ltd., v. The King (2) was a Petition of Right presented by de Keyser's Royal Hotel, Ltd., claiming to be entitled as of right to a fair rent for the use and occupation of their premises, of which possession had been taken by the Government for national purposes during the war. It was there held that the Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the property of a subject, and use it for administrative purposes in connexion with the defence of the realm without paying compensation for its use and occupation.

The facts of that case may be summarized as follows:—One Arthur Francis Whinney, Chartered Accountant, had been appointed Receiver of the suppliant company in June, 1915, and on the 8th May, 1916, the Principal Secretary of State for the War Department, or the Army Council, or some other person acting on the King's behalf, with the permission of Mr. Whinney on behalf of the suppliants, took possession of the premises. Prior to so taking possession some correspondence and negotiations had taken place between Mr. Whinney and the Office of Works in regard to rent and compensation, but without coming to any agreement, and the suppliants claimed a declaration that they were entitled to an annual rent so long as the Principal Secretary of State for the War Department, or the Army Council,

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(2) [1919] 2 Ch. 197.

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continued in occupation of the premises, and the sum of £13,520 11s. 1d. for use and occupation of the premises by the suppliants' permission, and, in the alternative, an inquiry as to what was a fair rent of the premises, and payment of the sum so found, and a declaration that they were entitled to a fair rent for use and occupation under the Defence Act, 1842, and for other losses and injurious consequences. The case was heard before Mr. Justice Peterson on the 22nd March, 1918, when he decided that there was evidence that in the opinion of the competent naval and military authorities the occupation of the suppliants' hotel premises was necessary to secure the public safety, and that he was bound by the decision of the Court of Appeal in the case to which I have already referred to hold that the company could not succeed in their application. From that decision the suppliants appealed.

Very long and learned judgments were delivered by the Master of the Rolls (Swinfen-Eady) and Warrington and Duke L.JJ. The majority of the Court (Swinfen-Eady and Warrington) reversed the decision of Mr. Justice Peterson (Duke L.J. dissenting). A very considerable portion of the judgment of the learned Master of the Rolls and the Lords Justices was devoted to a consideration of the question of the Royal prerogative. I do not propose to deal with that portion of the judgments, because, as I have pointed out, no question of the Royal prerogative has been either pleaded or argued in this case. The defendants here justify under the Defence of the Realm Act, 1914, and the regulations made thereunder. Swinfen-Eady M.R., in his judgment, says that the powers which the Executive exercise without parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened, and has provided by statute for powers previously within the prerogative being exercised in a particular manner, and subject to the limitations and provisions contained in the statute, they can only be so exercised. He deals with the question of the measure of compensation, and comes to the conclusion on the particular facts of that case that the suppliants should have a declaration that they were entitled to a fair rent for use and occupation by way of compensation. No doubt, the Court was there dealing with the Defence

Act of 1842, and with regulations framed with an object different from the one in question in this case ; but it seems to me that the judgments established some general principles which are applicable to the facts of this case, and, amongst others, that, although compulsory acquisition of land, whether permanent or temporary, is authorized without the need of any invasion while the Defence of the Realm Regulations remain in force, no power was conferred by the regulations to take the land of the subject without payment. In order to secure the public safety and the defence of the realm, it may be necessary to obtain immediate possession of lands and buildings, but neither the public safety nor the defence of the realm requires that the value of the subject's land or the temporary possession of it should be confiscated. Again, if the Executive Government is authorized to take and occupy land, paying compensation, there is no necessity for the safety of the realm to take it in any other way. Moreover, there is not any of the Defence of the Realm Regulations purporting to abolish the right to compensation. I am, therefore, of opinion that the plaintiffs here are entitled to compensation.

There remains to be considered the very difficult question as to the method and basis of compensation. In the *Cannon Brewery Case* (1) Mr. Justice Younger in the Court below, and Swinfen-Eady M.R. and Eve J. in the Court of Appeal, decided that the plaintiffs in that case were entitled to have compensation assessed under the Lands Clauses Act. Swinfen-Eady M.R. refers to the preamble of the Act of 1845 (8 & 9 Vict. c. 18), which recited that it was expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature, and to the compensation to be made for the same. He referred to sect. 1 of the Act, which provides as follows: "This Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of land for such undertaking, and this Act shall be incorporated with such Act ; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized

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thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed together therewith as forming one Act"; and to sect. 2, which provides as follows: "The expression 'the special Act,' used in this Act, shall be construed to mean any Act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which the Act shall be so incorporated as aforesaid; and the word 'prescribed,' used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act; and the sentence in which such word shall occur shall be construed as if, instead of the word 'prescribed,' the expression 'prescribed for that purpose in the special Act' had been used; and the expression 'the works' or 'the undertaking' shall mean the works or undertaking, of whatever nature, which shall by the special Act be authorized to be executed; and the expression 'the promoters of the undertaking' shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking."

After sect. 5 there follows a group of clauses dealing with the purchase of lands by agreement, and after sect. 15 another group of clauses dealing with the purchase of lands otherwise than by agreement. He says that the Act, i.e., the Defence of the Realm (Amendment) (No. 3) Act, 1915, authorizes regulations for giving the prescribed Government authority power to acquire premises, and, without any licence, to establish and maintain refreshment rooms for the supply of refreshments to the general public, or to any particular class of persons. The prescribed Government authority is thus empowered to carry on a great undertaking of a public nature; it is manifestly intended that shall be done with public money. He refers to the Downing Street Public Offices Extension Act, 1855, whereby the Commissioners of Works and Public Buildings were empowered to acquire compulsorily or by agreement certain hereditaments, and erect thereon certain offices and buildings for the public service, and that it was held by the Court of Appeal that the Lands Clauses Acts were applicable,

although not expressly mentioned in the Act of 1855. There was thus, he said, an "undertaking," and the Commissioners of Works and Public Buildings thereby incorporated were the "promoters of the undertaking." He refers to the judgment of Lord Esher in *In re Woods' Estate* (1), in which Lord Esher held that the Lands Clauses Act was incorporated in this Act of 1855. Swinfen-Eady M.R. said that the undertaking to be within the Act must be an undertaking of a public nature, as this undertaking certainly is. He then says that he is of opinion that the Defence of the Realm (Amendment) (No. 3) Act, 1915, authorizes an undertaking, and also authorizes the purchase or taking of lands for such undertaking, and it is quite immaterial that the detailed regulations are defined by an Order in Council, which the statute itself authorizes. The undertaking is authorized by the statute, and nothing but a statute could so authorize any such undertaking. The compulsory purchase of land, and superseding the ordinary licensing law, could only be effected by statute, and he says that in his opinion the Lands Clauses Acts apply only to an undertaking authorized by the Defence of the Realm (Amendment) (No. 3) Act, 1915.

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Lord Justice Bankes dissented from that view. He says that to come within the meaning of the expression "authorized," as used in the Lands Clauses Act, he thought that the undertaking must be sufficiently defined by the special Act to enable it to be ascertained from the language of the Act itself what the nature and extent of the undertaking was, so that by a comparison of the language of the special Act with the language of the Lands Clauses Act it might be determined, as sect. 1 of the Lands Clauses Act requires it to be determined, how far the clauses and provisions of the Lands Clauses Act are expressly varied or excepted by the special Act, and how far they are applicable to the undertaking authorized by the special Act.

It will be observed that the decision of Younger J., Swinfen-Eady M.R., and Eve J. on this point was based upon the language of the statute, namely, the Defence of the Realm (Amendment) (No. 3) Act, 1915, which the Master of the Rolls considered was an Act which empowered the prescribed Government

Powell J. authority to carry on a great undertaking of a public nature with
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In the present action the defendants justify under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), which, by sect. 1, provides that His Majesty in Council has power during the continuance of the present war to issue regulations (inter alia) for securing the public safety and the defence of the realm. The regulation relied upon by the defendants, 2 L, made in pursuance of that Act, was a regulation enabling the prescribed authority to exercise certain powers, including the power to enter on and cultivate land with a view to maintaining the food supply of the country, and in my opinion it would be straining the language of sect. 1 of the Act of 1845 to hold that this purpose constitutes an undertaking authorized by the Act. The Master of the Rolls points out that nothing but a statute could authorize an undertaking; the regulations could not authorize it; and I think it would be going very far to hold that because regulations framed under sect. 1 of the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), provide for the temporary occupation of lands for a temporary purpose this could be deemed to be an "undertaking" authorizing the purchase or taking of lands for such undertaking. If regulation 2 L were to be held to constitute an undertaking within the meaning of the Lands Clauses Act, then it appears to me that it would follow that the clauses and provisions of the Act of 1845 are expressly varied or excepted by clause 4 of Regulation 2 L, which provides that the amount of compensation to be paid to persons injuriously affected by the exercise of the powers under the regulation is to be determined, in default of agreement, by a single arbitrator under and in accordance with the provisions of the Second Schedule to the Agricultural Holdings Act, 1908. The Master of the Rolls has held that subsequent regulations cannot exclude the operations of the Lands Clauses Acts, but that is upon the assumption that the Act itself, that is to say, the Defence of the Realm (Amendment) (No. 3) Act, 1915, was incorporated in the Lands Clauses Act, 1845, but I do not think that it can be said that sect. 1 of the Defence of the Realm Consolidation Act, 1914, is incorporated in the Lands Clauses Act. But Lord Justice Bankes said that unless

the respondents are right in their contention that the Lands Clauses Act applies to their case, there would be no obstacle to the respondents enforcing their right of payment for the property by action.

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Under Clause 4 of Regulation 2 L it would appear to me that the question of compensation does not arise until the determination of the occupation of the land by the Board under the regulation, and that then the amount of the compensation is to be determined, in default of agreement, by a single arbitrator under and in accordance with the provisions of the Second Schedule to the Agricultural Holdings Act, 1908; but sub-head 6 of Clause 8 of the regulation provides that this sub-s. 4 shall not apply to Ireland. Indeed, so far as the method of assessing compensation is concerned, it could not be applicable to Ireland in its present form, because the Agricultural Holdings Acts, 1908, apply to England and Scotland, and not to Ireland. See the English Act of 1908 (8 Edw. 7, c. 28) and the Scottish Act (8 Edw. 7, c. 64). The method provided by sub-s. 4 of Regulation 2 L not being available, the amount must be determined in an action between the parties: *Bentley v. Manchester, Sheffield, and Lincolnshire Railway Company* (1). It was not argued by counsel for the defendants here that this action was premature by reason of the fact that under sub-s. 4 compensation is not to be payable until the determination of the occupation of the land. I apprehend they could not successfully so contend by reason of the fact that this particular sub-section does not apply to Ireland. I offered to allow the defendants to amend their defence by pleading the second order of the 2nd day of July, but Serjeant Matheson elected to rely only upon the order of the 16th of March, 1918. It transpired during the hearing of the case that in addition to the order of the 16th March, 1918, made by the defendants under the regulation, and which is the only order relied upon in the pleadings, a subsequent order was made on the 2nd day of July, 1918. By the order of the 16th March, 1918, the defendants authorized the County Borough Council of Dublin to exercise on behalf of the Department the powers conferred by the regulation, and Clause No. 2 of the authorization is as follows :

(1) [1891] 3 Ch. 222.

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“The Council shall use the lands for the purposes of an allotment scheme, to be approved of by the Local Government Board, for the growing of one crop only of potatoes or other vegetables.” No further authorization was proved to have been made by the defendants to the County Borough Council of Dublin, although the licensees have remained in possession, as I understand, and are using the lands down to the present moment.

Mr. Healy has asked me to assess compensation upon the basis that the present occupiers of the land became trespassers after they had used the land for the growing of one crop in pursuance of the authorization of the 16th March, 1918. The Board's order of the 16th March, 1918, recites that the defendants are of opinion that with a view to increasing the production of food in the country, it is expedient that they should exercise the powers given to them under Regulation 2 L, and that they were further of opinion that in order to provide the necessary food for residents in the locality of the Urban District of the County Borough of Dublin lands in or near the said Urban District, namely, the lands described in the schedule, were immediately required for the purpose of being cultivated in allotments, and that the use of the lands for that purpose is unreasonably withheld. And the order declares that the Department, in the exercise of the powers given to them under Regulation 2 L, sub-sects. 8, 3 (c), decided to enter upon the said lands, and to arrange for the cultivation thereof in accordance with the provisions of the regulation.

Mr. Healy has asked me to hold that the lands were not unreasonably withheld, but I do not feel at liberty to enter into that question, having regard to the decision of the Master of the Rolls and the Court of Appeal in the injunction action already referred to by me. No period of time is declared by the order during which the defendants are to remain in possession of the lands and to arrange for the cultivation thereof. They are entitled under sub-clause 8 (d) of the regulation to arrange for the cultivation of the land in such manner and upon such terms and conditions as they may direct. They have arranged in respect of one crop by the authorization of the 16th of March, 1918, and I do not think it is open to me in this action to assume that they have not made subsequent arrangements for the cultivation of the land. It

appears to me that the order of the 16th of March, 1918, so far as they are concerned, is a justification for their entry upon the lands, and their continuance in possession of the lands, through the persons with whom they made these arrangements; and I am of opinion that it is my duty to have the compensation assessed as against them down to the date on which this action was brought. I will, therefore, direct an inquiry before the chief clerk as to the compensation to be assessed.

I was at one time inclined to decide at this stage the different headings under which this compensation should be assessed so as to enable the parties to have my decision on the matters in question—namely, liability or no liability for compensation, and my decision as regards the various heads of compensation—reviewed by the Court of Appeal. On consideration, however, I think it is quite likely that the Court of Appeal might decline prospectively to decide this latter question.

Counsel for the plaintiffs have, in writing, submitted the heads of compensation which they say should be assessed. I will have the compensation assessed under these headings at the plaintiffs' risk, and also on the basis of use and occupation, which I understood Serjeant Matheson to say was the proper basis if compensation were to be awarded at all. When the compensation has been thus assessed, the result will come before me to be reviewed. I consider that this is the most convenient course to adopt; but if, having regard to my decision and judgment, the parties can arrange between themselves upon a basis of compensation, I shall adopt it. The defendants must pay the costs.

NOTE BY REPORTER.—The case was further argued on minutes on the 22nd of January, 1920, and the learned Judge, by consent, directed an inquiry before the chief clerk upon the basis that the defendants had acquired the plaintiff's land by agreement for the purpose of tillage, taking into consideration (1) the amount received by plaintiffs prior to the taking, and (2) the rent at which the land could have been let during the occupation, without prejudice to the plaintiffs' rights as to damages accruing subsequent to the date of the contract, with liberty to the plaintiffs to apply.

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Solicitors for the plaintiffs: *Rooney & Co.*

Solicitor for the defendants: *The Chief Crown Solicitor.*

M. R. IN THE MATTER OF THE ESTATE OF EDWARD PETER
 1920. O'KELLY, DECEASED. THOMAS BURKE, MARION
 Feb. 9. COSTELLO, PATRICK J. WALSH, TRADING AS
 March 22. THOMAS J. COSTELLO & CO., PLAINTIFFS; JOSEPH
 P. WHELAN AND MYLES W. WHELAN, AND BY
 AMENDMENT, EDWARD J. O'KELLY, DEFENDANTS.

(1916. No. 342.)

Administration—Legatee of a testator's business trading with the assets for his own benefit—Indemnity—Creditors of the testator entitled to payment in priority to creditors of the trading carried on after the testator's death.

A legatee to whom a testator had bequeathed his business continued to carry it on with the acquiescence of the executors. After decree for administration the business was conducted by a receiver appointed by the Court, and was subsequently sold by the Court as a going concern. The assets were insufficient to pay all liabilities in full.

Held, that the legatee had no duty to perform towards the estate, and, therefore, was not entitled to any indemnity, and that the creditors of the testator were entitled to be paid in priority to the creditors whose debts were incurred during the legatee's trading.

SUMMONS.

Edward Peter O'Kelly, who carried on business at Baltinglass, Co. Wicklow, as an auctioneer, grocer, and licensed publican, died on the 22nd July, 1914, having by his will devised all his property to his eldest son, the defendant, Edward J. O'Kelly, subject to the payment of certain money legacies bequeathed to the testator's other children, and the testator appointed the defendants, Joseph P. Whelan and Myles Whelan, and his daughter, Eileen Gorman, his executors. No express authority was given to the executors to carry on the testator's trade, but the will, after stating that the testator had whisky in store to the value of £1,000, added the words, "so that the establishment should go on as usual," followed, amongst other bequests, by the words, "of course the property, stock and trade, book debts, and anything more I

shall acquire during my lifetime goes to my son Edward." Probate of the will was granted to Joseph P. Whelan and Myles Whelan, and they allowed the testator's son Edward to go into possession of the business ostensibly as legatee, and to carry on the trade for his own benefit. The testator died indebted to unsecured trade creditors for goods supplied, and also to the National Bank, who held as security a deposit of the title-deeds of freehold and leasehold houses and farms owned by the testator. Edward J. O'Kelly carried on the trade for two years, incurring fresh liabilities to creditors, and in 1916 two of this latter class, viz., Wm. Redhouse and the Dublin General Steamshipping Co., obtained judgments against him for £113 and £125 5s. 6d. respectively, and lodged writs of execution with the Sheriff of the Co. Wicklow. At this stage, in order to protect the estate from these writs, the plaintiffs, who were unpaid creditors of the testator, commenced these proceedings by originating summons for the administration of his real and personal estate. An order for administration was made on the 29th May, 1916, directing the usual accounts and inquiries. By a subsequent order of June 5th a receiver and manager was appointed to carry on the trading, and receive the rents and profits of the real and chattel real property, and by the same order the two execution creditors were directed to withdraw the executions levied by them without prejudice to their rights, if any, "whether against the goods and property of the defendant, Edward J. O'Kelly, or against the assets of the testator." By order of the 5th March, 1917, the Court directed a sale of the freehold and leasehold properties and of the licensed business premises as a going concern, and by order of August 30th, 1917, the defendant, Edward J. O'Kelly, was accepted as a purchaser of the licensed business premises and goodwill, and also of the stock in trade. Pursuant to leave in the last-mentioned order, the National Bank lodged the deposited title-deeds in Court and concurred in the sale, and the debt due to them was ultimately paid in full out of the proceeds. The Chief Clerk's certificate was filed on May 15th, 1917, and the debts of the testator were ascertained at £2,861 2s. 2d., which included the Bank's secured debt of £2,443 19s 3d., and the debts incurred by the trading carried on after the testator's death were certified at £1,214 1s. 4d. By the

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order on further consideration of November 12th, 1917, the Master of the Rolls declared the creditors of the testator entitled to be paid the amounts of their respective debts out of the assets of the testator, and he made no order regarding the rights of the creditors of the trading carried on by Edward J. O'Kelly in the absence of some person to represent the legatees under the will, the question of the fund out of which the said debts should be paid being specially reserved. By order of January 14th, 1918, the Master of the Rolls declared the creditors of the trading carried on by the defendant, Edward J. O'Kelly, after the testator's death, entitled to be paid out of the assets of the testator the amounts of their respective debts in priority to any payment on account of pecuniary legacies. By a further order of March 31st, 1919, it was ordered, all parties consenting, that a dividend of 10s. in the pound should be paid to and among the creditors of the testator, and the creditors of the trading carried on after his death by the defendant, Edward J. O'Kelly, such order not to be deemed to prejudice the rights inter se of the two classes of creditors as regards any future payments on foot of their respective debts. Up to the date of the last-mentioned order, it was believed by all parties that the estate would prove solvent, but subsequently it was ascertained that, after providing for costs and other charges, it would not be possible to pay both classes of creditors in full. Accordingly, a summons was issued by the plaintiffs to have the rights of the two classes of creditors determined.

Blood K.C., for the plaintiffs, the creditors of the testator:—

The plaintiffs are entitled to priority. The will did not authorize the executors to carry on the trading, nor was it in fact so carried on. They merely allowed the defendant Edward J. O'Kelly to take possession of the business as legatee, and the trading carried on after the testator's death was not the trading of the executors, but of Edward J. O'Kelly—a fact which is expressly stated in some of the orders made with the acquiescence of all parties. The present case is altogether outside the principle established in *Dowse v. Gorton* (1). The executors here cannot

claim any indemnity in respect of the claims of the creditors of the trading after the testator's death, because the executors did not in fact trade. A legatee who carries on the trading as such is not entitled to any indemnity. In substance, this is a suit to follow the assets into his hands, and the debts of the testator must be paid first. He referred to *Hodges v. Hodges* (1), *M'Aloon v. M'Aloon* (2), Williams on Executors (10th ed.), 1554, 1555.

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McGrath K.C., for the defendant Edward J. O'Kelly :—

The result of the trading since the death of E. P. O'Kelly has been to make very large profits, out of which E. J. O'Kelly has paid large sums to the old creditors. In the course of making these profits he incurred liabilities to the second schedule creditors, and it is submitted that the first schedule creditors cannot claim to appropriate the profits without meeting the liabilities. After meeting the liabilities, the net profits going to the accretion of the deceased's estate and to the benefit of the first schedule creditor would still be very large, and it would be inequitable that they should be given more. The will of deceased gave an implied authority for the business to be carried on, and its carrying on by E. J. O'Kelly should be treated as a carrying on by the executors. He relied upon the judgment of Lord Macnaghten in *Douse v. Gorton* (3) as supporting the claim of the second schedule creditors.

Andrews K.C., for the Dublin General Steamship Company, Ltd., creditors of the second class :—

My clients have been found by the Chief Clerk's certificate to be creditors for the sum of £141 7s., which includes sheriff's fees. Their position differs from that of other creditors of the trading carried on subsequent to the death of the deceased, in that they had recovered judgment for their debt against the defendant Edward J. O'Kelly personally, prior to the institution of these proceedings, and the sheriff had seized certain assets of the trading. By order of 5th June, 1916, they were ordered to withdraw execution without prejudice to their rights against the goods of the defendant Edward J. O'Kelly or

(1) [1899] 1 I. R. 480.

(2) [1900] 1 I. R. 367.

(3) [1891] A. C. 190.

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the assets of deceased. The trading carried on by the defendant Edward J. O'Kelly was in reality that of the executors. This Court by its orders already made in this matter has treated the trading as that of the executors, and as being authorized by the will. The order of 14th January, 1918, declaring the creditors of Edward J. O'Kelly named in the second schedule of the Chief Clerk's certificate entitled to be paid their debts out of the assets of the testator in priority to any payment on account of pecuniary legacies bequeathed by the will, could only have been made on this basis. The trading of Edward J. O'Kelly was profitable to the estate, and the Court cannot appropriate the profits of that trading to pay the deceased's creditors, and at the same time leave Edward J. O'Kelly to pay his own creditors. To do so would be to both approbate and reprobate, and would be most inequitable. [He also referred to *Dowse v. Gorton* (1), *Brooke v. Brooke* (2), and *Hodges v. Hodges* (3).]

Smylie, for Messrs. W. and H. M. Goulding & Co., creditors of the second class:—

My clients did not take proceedings against the defendant E. J. O'Kelly, as they considered themselves trading with the old firm as carried on by the deceased's executors. The creditors of the deceased stood by while the trading by the defendant E. J. O'Kelly was being carried on, as did the deceased's executors. In so small a town as Baltinglass, it is impossible to suppose that it was not known that the trading as carried on by E. J. O'Kelly was beneficial. All stood by while the estate benefited by such trading to the extent of £1,500. The creditors of the deceased claim the benefit of this trading, and refuse to admit the claims of the second class creditors. It is further submitted that the second class creditors are within the principle laid down by Lord Macnaghten in *Dowse v. Gorton* (1).

Overend K.C., for the defendants, the executors.

(1) [1891] A. C. 190.

(2) [1894] 2 Ch. 600.

(3) [1899] 1 L. R. 480.

(4) [1891] A. C., at p. 203.

O'CONNOR M.R. :—

In this case there is a contest for priority between two classes of creditors who claim to be paid out of the testator's estate. The first class consists of creditors of the testator in respect of debts incurred by him. The second class consists of creditors whose debts were incurred since the testator's death in respect of trading with the testator's business by a beneficiary under his will, up to the date at which a manager was appointed over it by the Court. These creditors claim to be paid in at least equal priority with those in the first class.

The claim of the second class of creditors is sought to be brought in some way within the principle of *Dowse v. Gorton* (1); but I am unable to see its application. That case decides that when a trading is carried on by executors, with the assent of the testator's creditors, the creditors of the executors are entitled to be paid out of the assets of the testator in priority to the creditors whose debts were incurred by him during his lifetime; but this priority is given for the sole reason that their rights are subrogated to the right of indemnity which the executors have against the assets. I have been unable to find any case, and I have not been referred to any, in which a beneficiary has been held entitled to a like indemnity. No doubt in this case the executors seem to have stood by and allowed the beneficiary to continue to carry on the testator's business; and when the manager appointed by the Court took over the business it was taken over as it was left by the beneficiary, and was afterwards sold as a going concern, and a concern which had been kept going by the beneficiary. It has also been averred that the result was a very beneficial sale. But, even so, I cannot see how credit given to a beneficiary under the testator's will can impose an obligation on the testator's estate. The beneficiary had no duty to perform towards the estate, and the right to indemnity springs out of the duty cast upon the executor, the performance of which entitles him to relief against the trust estate. If the creditors of the trading dealt with the beneficiary as the agent of the executors, they might have been in a position to sue the executors.

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But in that case they would be the creditors of the executors, and they might have been entitled to an indemnity which would enure for the benefit of the creditors. They did not, however, deal with the beneficiary as acting for the executors. They dealt with him as a principal. This is manifest from the fact that the creditors who represented the second class of creditors in the argument actually got judgment, and were prepared to issue execution against the goods of the beneficiary. The second class of creditors have, strictly speaking, no claim against the testator's assets; but I understand that no one claiming under the will disputes their right to be paid, and the only question I have to decide is whether the testator's creditors have priority. For the reason I have given, I am of opinion that they have priority.

By consent of all parties a dividend of 10s. in the £ has already been paid to both classes of creditors. It has been found that the available assets are not quite enough to pay the balance in full, and hence the question which I have dealt with was raised.

Solicitors for the plaintiff: *Wm. Findlater & Co.*

Solicitor for the defendant Edward J. O'Kelly: *D. P. Blayney.*

Solicitors for the Dublin General Steamshipping Co., Ltd.:
Hone & Falkiner.

Solicitors for W. & H. M. Goulding, Ltd.: *Molloy, Fayle, & Co.*

Solicitors for the defendants, the executors: *Brown & McCann.*

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HAYES' ESTATE (1).

*Joint tenancy—Severance.**Appeal.*

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April 22, 23.

An agreement for sale entered into by the persons who were together joint tenants of real property does not in itself, and in the absence of evidence of intention, operate as a severance of a joint tenancy in the purchase-money.

Decision of Wylie J. (*ante*, page 103) reversed.

APPEAL from a decision of Wylie J., holding that an agreement for sale under the Land Purchase Acts by all joint tenants effected a severance of the joint tenancy. The material facts, and the judgment in the Court below, are reported *ante*, p. 103.

Murphy K.C. and *Marnan*, for the appellants:—

The fallacy underlying the judgment of Wylie J. is that he treats the joint agreement by the six joint tenants as equivalent to separate agreements by each of them. As a matter of fact, they ratified, as one owner, the agreement which had been entered into by their predecessor in title with the Congested Districts Board. We submit that Wylie J. took an erroneous view of *Kingsford v. Ball* (2), upon which he based his judgment. In no text-book is that case referred to as an authority for any proposition save the simple one that a contract for sale by one joint tenant severs the joint tenancy.

They cited *Williams v. Hensman* (3); *In re Wilks* (4); *Leak v. MacDowall* (5); *Brown v. Raindle* (6); *Palmer v. Rich* (7); Sugden's Vendors and Purchasers, 698; Dart on Vendors and Purchasers, 6th ed., vol. i, p. 312; Foster's Joint Ownership, 38-39.

Walker K.C. and *J. E. Walsh*, for the respondents:—

It is well-settled law that an agreement for sale by one of two or more joint tenants severs his joint tenancy; and an agreement

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

(2) 2 Giff. App. 1.

(5) 32 BEAV. 28.

(3) 1 J. & H. 546.

(6) 3 Ves. junr. 256.

(4) [1891] 3 Ch. 59.

(7) [1897] 1 Ch. 134.

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by all is the same as if each had contracted to sell separately quoad his share. Therefore an agreement for sale by all joint tenants for valuable consideration effects a severance. *Kingsford v. Ball* (1) is the only authority, such as it is, on the question. The passage in that case upon which we rely is: "The contract was operative as a severance." And in his own book on Vendors and Purchasers Lord St. Leonards cites *Kingsford v. Ball* (1) as an authority for that proposition. When the joint tenants in this case agreed to sell they contemplated that payment of the purchase-price would be made separately to each of them.

They also referred to *Musgrave v. Dashwood* (2); *Morley v. Bird* (3); *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs* (4); Burton's Law of Property, 7th ed., 246; Bacon's Abridgment, vol. iv, p. 494; Dart on Vendors and Purchasers, 7th ed., vol. i, p. 313; *ibid.*, vol. ii, p. 1031.

In conveyances by joint tenants who have entered into a contract of sale, each of them conveys his own share, estate, or interest as beneficial owner thereof. The covenants of joint tenants should, in the absence of agreement to the contrary, be limited to the equal shares to which they are respectively entitled: Watkins' Conveyancing, 8th ed., p. 109; 2 Dav. Prec., 4th ed., pt. i, p. 359. Though seised per my et per tout, each of them, for all the purposes of alienation, is seised of, and has a power of, alienation over that share only which is his aliquot part: 2 Preston's Abstracts, 62.

SIR JAMES CAMPBELL C. :—

In this case the owner of an estate initiated proceedings for a sale to the Congested Districts Board, but he died before the sale was carried out. The property then became vested in six daughters of Sir Edmund Samuel Hayes, who died in 1860, as joint tenants. These six ladies adopted the proposal that had been made by their predecessor in title, with the result that the

(1) 2 Giff. App. 1.

(2) 2 Vern. 45.

(3) 3 Ves. 629; Tudor's Cases

on Real Property, 263, 278.

(4) [1900] 2 Ch. 280.

necessary proceedings ensued, and the property was sold. A question then arose in regard to the distribution of the purchase-money and the payment of the bonus. In the interval two of the joint owners had died. Of the four remaining, one is represented by Mr. Murphy, and she has appealed from the decision of Mr. Justice Wylie, in which he held that the effect of the transaction had been to sever the joint tenancy in the lands. Mr. Justice Wylie tells us plainly that his conclusion is based on the general proposition that a contract of sale by joint tenants of necessity, per se, effects a severance, and for this proposition he relies upon the decision in *Kingsford v. Ball* (1). So far as it is possible to ascertain from the meagre relation of the facts and from the judgment what the precise point decided in that case was, it seems to me that it cannot be relied upon for such a universal proposition. It is peculiar in this respect: that between the date of the contract of sale and its ultimate completion the joint owners had entered into an agreement inter se, which undoubtedly had the effect of severing the joint tenancy; but when they came to complete the contract they relied upon their title as joint tenants, ignoring or concealing the fact that in the interval that joint tenancy had been severed. Further, it appears that the purchase-money in respect of the contract of sale was divided between them, and in view of these facts it seems to me there was no alternative but to hold that they had not only in fact severed the joint tenancy, but had intended to do so.

In this case I can find no evidence of any intention on the part of the joint tenants to sever. At first I thought there might be some weight in the suggestion that by reason of their deliberate act in changing the subject-matter of the property from land into money, an inference might be drawn that severance was intended, as, generally speaking, money might reasonably be supposed to be held by the owners thereof in their respective shares and proportions. On the other hand, the purchase-money in this case is represented by stock, and there is no reason in the nature of things why joint tenants might not be equally well satisfied to hold the stock as joint property just in the same way as if, instead of selling the estate for money, they had exchanged it for other

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(1) 2 Giff. App. 1.

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If the facts do not justify the inference that, in regard to the purchase-money, the parties intended that their interest should be severed, I do not see how we can draw any inference in the case of the bonus which follows the purchase-money and its destination, inasmuch as title to the bonus and purchase-money will be in the same persons. This is the short ground upon which I base my judgment. Mr. Walker has suggested that in *Sugden's Vendors and Purchasers* the decision in *Kingsford v. Ball* (1) is treated as laying down the universal proposition for which Mr. Justice Wylie relied upon it as an authority. But the passage in *Sugden* is almost as obscure as the report of the reasons of Lord St. Leonards for the decision itself, and I cannot draw the inference that the case decided the point at issue here.

I have come to the conclusion that the decision of Wylie J. cannot be supported, and that the appeal must be allowed.

RONAN L.J. :—

In this case six joint tenants of certain land jointly agreed to exchange it for a sum of £27,000 stock. I can see no evidence of any intention that their title or rights inter se to the stock should be in any way different from their rights to the land; and I decline to presume an intention on their part to effect a severance in the absence of any evidence of such an intention. The proper performance of such a contract would be a joint conveyance of the lands by the vendors to the purchaser, and the transfer by him of the stock into the joint names of the vendors. Here the lands are vested in the purchasers by the Land Commission and the stock is to be transferred by them to the vendors. Surely in the absence of any evidence of a contrary intention it should be transferred to them jointly. This would of course make them joint tenants at law. I can see nothing to prevent its having the same effect in equity. The rights of the parties in equity rest on the principle that equity regards as done that which ought to be done.

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In this case six persons were joint tenants of an estate; they agreed to sell the estate through the Land Commission; in pursuance of that agreement the estate was sold; Wylie J., in the circumstances, held that they became tenants in common of the purchase-money. I can see no principle upon which the decision can be supported. There was no evidence whatever of any intention to sever the joint tenancy, unless the transaction itself constitutes such evidence. Why should it? Take the converse case. If these six persons had been entitled as joint tenants to a sum of money, and with that money agreed to buy a parcel of land, they would, immediately after they signed the contract, have been equitably entitled to the land as joint tenants, and not as tenants in common. A mere agreement by persons entitled as joint tenants to convert their property from one species to another does not operate to work a severance. It is true that when the transaction comes to be completed they may effect a severance: in the case of money converted into land, by the limitations in the conveyance; in the case of land converted into money, by taking and dividing the money. But there is nothing of that kind here. The case of *Kingsford v. Ball* (1) has been cited by the respondents. As I read that case, the sum of £10,000, paid by way of deposit, was received by the parties and divided equally between them; this was the most effectual method of severance that could be imagined; and that case, the report of which is somewhat obscure, is therefore no authority in the respondents' favour. I agree that the appeal should be allowed.

Solicitors for the appellants: *Wm. Findlater & Co.*Solicitors for the respondents: *McMahon & Tweedy.*

C. L.

(1) 2 Giff. App. 1.

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April 23.

IN THE MATTER OF THE ESTATE OF ANTHONY DUNICAN, DECEASED. JAMES DUNICAN, PLAINTIFF; MARY DUNICAN, DEFENDANT.

(1918. No. 430.)

Administration — Registered freehold land — Valuation under Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), ss. 2, 3, 5, 6—Charge on real and personal estates in proportion to their values.

Under sects. 1 and 2 of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), the widow of an intestate leaving no issue is entitled, where the net value of the real and personal estates exceeds £500, to £500 "part thereof" absolutely, and to a charge of £500 upon the whole of his real and personal estates, to be borne in proportion to the values of the real and personal estates ascertained as in the Act provided.

Held, that the Act gives to the widow merely a charge on the realty in respect of the proportion of the £500 to be borne by such estate, and that she is not entitled to any portion of the real estate in specie.

APPEAL by the defendant from an order made by Mr. Justice Powell on February 16th, 1920, dismissing an appeal against so much of the order in this suit at Chambers on January 20th, 1920, as directed that the freehold registered land of the deceased should be sold.

Anthony Dunican, the deceased, died on July 13th, 1917, intestate, leaving him surviving Mary Dunican, his widow, but no children. He left several next-of-kin, including brothers and sisters, nephews and nieces. His assets consisted of personalty valued at £1300 and freehold registered land, subject to an annuity of £37 6s. 2d., payable to the Irish Land Commission under the Land Purchase Acts, and valued, as provided by the Intestates' Estates Act, 1890, at £461.

Letters of administration of the personal estate of the deceased were granted to Mary Dunican, the defendant, on January 23rd, 1920. On May 8th, 1920, a summons for the administration of the estate was issued by the plaintiff, James Dunican, a nephew of the deceased.

H. D. Conner K.C., and *G. Farrell*, for the appellant :—

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This is, in effect, an appeal from the decision of Powell J. in *Cunningham v. Cunningham* (1). If the intestate in this case had left no personalty, the widow would have taken the registered freehold land absolutely. Although freehold registered land to which Part IV of the Local Registration of Title (Ireland) Act applies devolves as personalty, it is valued under section 5 of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), as real estate : *Farrelly v. Farrelly* (2). Valuation made according to the mode prescribed by the Act results in a fictitious figure. Section 5 provides that the "net value" of real estate shall be estimated "in the case of a fee-simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon." It is net value that has to be taken into account; and it not infrequently happens that a holding purchased under the Land Purchase Acts, and registered under the Local Registration of Title Act, may be valued under section 5 of the Intestates' Estates Act at much less than £500, although it may actually be worth £1000 or more.

We submit that under the words "part thereof," in section 2 of the Intestates' Estates Act, 1890, the widow is entitled to a specific interest in the real estate, and not merely to a charge thereon. The personal estate is liable for £370 out of the £500, and the realty to £130. If there was no personalty in this case, she would get the whole of the land. We say she is entitled to $\frac{130}{470}$ ths of the realty in specie.

Denning K.C., and *W. G. Shannon*, for the respondent, were not called upon.

(1) [1920] 1 I. R. 119.

(2) [1918] 1 I. R. 488.

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SIR JAMES CAMPBELL C.:—

We think it unnecessary to hear any further argument in this case. The over-riding principle is that where property exceeds £500 in value the widow gets £500 as well as her share in the residue; but by no process of analysis can these sections be so interpreted as to give the widow more than £500 as her absolute property. It has been suggested that on account of the method of valuation adopted, if a farm actually worth £1000 is valued for the purposes of the Act at £500, the widow may capture it all. The sum she is to get is not to exceed £500. She does not get a specific charge on any share of the property except as security for the £500. We are asked to make a charge for £500 something resulting in a charge for three or four times that figure.

We cannot interfere with the decree made by Mr. Justice Powell, ordering that the real estate should be sold. Until the death of the registered owner, the holding in this case was, for all practical purposes, real estate. On his death it descended as personal estate, and consequently passed to his administrator. When the administrator got it, what was he to do with it? How else can he discharge his duty except by having the property sold? This appeal must be dismissed with costs.

RONAN L.J.:—I concur.

O'CONNOR L.J.:—

I concur. Where the value of the property, ascertained by the method provided by the Act so far as real estate is concerned, does not exceed £500, the widow takes the entire; but once the £500 limit is exceeded, what she gets is not a specific part of the property, but a charge for £500 which the statute imposes upon the real and personal estates in proportion to their respective values. This is a case of that kind.

Accordingly, when the estate comes to be administered, two possible cases arise: the first is where there is realty in the strict sense; and the second is where there is realty which is not realty so far as transmissibility is concerned, because by virtue

of the Local Registration of Title (Ireland) Act it passes to the personal representative. In the first case the proportions in which the £500 is chargeable upon the personalty and the realty have to be ascertained, and an order made accordingly. When the heir-at-law pays off the widow he gets the realty discharged from any claim by her. The other case is the one before us, where the real estate is transmissible to the personal representative for distribution amongst those entitled under the Statute of Distributions. The order for sale was perfectly right. The £500 apportioned on the real and personal property, in their respective proportions, will be given to the widow. The excess over £500 will be distributed amongst the parties entitled under the Statute of Distributions.

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Solicitor for the appellant: *C. J. P. Farrell.*

Solicitor for the respondent: *T. Conway.*

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April 27.
May 15.

IN RE SANDES' TRUSTS.

(1920. No. 207.)

Proceeds of sale of lands in hands of Settled Land Act Trustees—Dealings by beneficiaries—Necessity for notice to Trustees—Priorities—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22, sub-s. 5.

By the joint operation of the trusts of a marriage settlement, and the will and codicil of C. S., certain lands were settled upon trust for C. S. for life, with remainder to his widow M. S. for life, with remainder to their daughter I. S. absolutely, provided she survived her mother. The lands were sold through the Irish Land Commission, and the Public Trustee was appointed trustee for the purpose of the Settled Land Acts, and the purchase-money of the lands was paid to him. I. S. mortgaged her interest in the proceeds of the sale to an insurance society, and notice of the mortgage was given to the Public Trustee. I. S. subsequently gave a second mortgage of the same funds to H. F., but no notice of this mortgage was given to the Public Trustee. I. S. then gave a third mortgage of the same funds to the said society, due notice of which was given to the Public Trustee.

Held, that the insurance society took priority for both their mortgages over H. F.

Carew's Estate (16 W. R. 1077) not followed.

This was an Originating Summons, entitled *In the Matter of the Trusts of a Settlement made the 16th day of November, 1867, between Charles Sandes of the one part and Mildred Brown of the other part, and of the will of Charles Sandes, dated the 7th day of January, 1889, and of a codicil thereto, dated the 13th day of November, 1889. And in the Matter of the Estate of Mildred Sandes, a Vendor of Land, Record No. E.C., 8378. And in the Matter of the Irish Land Act, 1903, section 52.*

By the joint operation of a deed dated the 16th November, 1867, and a codicil to the will of Charles Sandes, certain lands stood limited after the decease of the testator's wife to his daughter, Isabella Sandes, who subsequently married the Rev. Robert Ronayne, subject to a gift over in the event of the said Isabella predeceasing her mother.

The testator died in the year 1893, and his widow went into possession of the lands as tenant for life. During her life the lands were sold under the provisions of the Irish Land Purchase

Acts, and for the purpose of making title an order was made by the Land Commission, dated the 19th November, 1912, appointing the Public Trustee for Ireland trustee of the settlement for the purposes of the Settled Land Acts. The purchase-money was allocated by the Land Judge, and the net residue after paying paramount claims was transferred to the Public Trustee, who invested it in £1000 Japanese Government $4\frac{1}{2}$ per cent. Sterling Loan; £1000 Chilian Government 5 per cent. Loan, 1896, Bonds; leaving a small balance in his hands of £18 19s. 4d. cash. The income of these funds was payable to the testator's widow during her life, and it was paid to her by the Public Trustee.

During the widow's lifetime her daughter Isabella, who had married the Rev. Robert Ronayne, required an advance, which she procured from the Equity and Law Life Assurance Society. The security offered was the borrower's reversionary estate in the funds; but as this was contingent on her surviving the tenant for life, the society required as collateral security a policy on her life, payable only in the event of her predeceasing the tenant for life. Such policy was effected with the society for the sum of £1600, and by an indenture, dated the 29th April, 1913, made between Isabella Ronayne (the borrower) of the one part, and the society of the other part, in consideration of the sum of £700 advanced to her by the society, she, as beneficial owner, conveyed to the society the funds and investments I have mentioned as representing the lands which had been sold, and also the policy of assurance: To Hold unto and to the use of the society, subject to a proviso for redemption on repayment of the advance with interest. By notice in writing, bearing even date with this mortgage, the Public Trustee was notified by the society of this mortgage. The notice was received by the Public Trustee on the 2nd May, 1913.

In March, 1914, Isabella Ronayne and her husband required a further advance of £300, and negotiations were opened up on their behalf by Mr. Graham Goold, their solicitor, with Messrs. Rooper & Whitely, the solicitors for the society, for the purpose of obtaining the advance; but the society declined to make it.

Having failed to get a further advance from the society, Mr. and Mrs. Ronayne sought for it elsewhere, and they found a

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M. R. lender in the person of Miss Hester FitzGerald, who advanced
 1920. them £400 on the security of a mortgage, dated the 7th April,
In re 1914, of the borrower's equity of redemption in the funds and
SANDES' the policy of assurance. Subsequently Mrs. Ronayne obtained
TRUSTS. a further advance from the society, which was secured by a
 mortgage dated the 10th of January, 1916. Contemporaneously
 with the mortgage of April, 1914, notice of it was given to the
 society.

Phelps, for the Public Trustee.

W. S. Norwood K.C. (with him *Hungerford*), for Miss Hester
 FitzGerald:—

We admit that no notice of our mortgage was given to the
 Public Trustee, but the insurance society had notice of it before
 the second mortgage was made to them. The notice of the
 7th April, 1914, which stated that the mortgagor had (*inter alia*)
 assigned the policy, must be taken to have brought to their notice
 that these funds were the only property which could come within
 the expression "*inter alia*," as the mortgagor had herself tried in
 vain to get a further advance on the property comprised in the first
 mortgage, and she had no other property.

In any event, notice either to the Public Trustee or to the society
 was unnecessary. These funds are not a chose in action, but are in
 equity real estate under sect. 22 of the Settled Land Act, 1882.
 Notice of a mortgage of land was never necessary to complete
 the mortgagee's title: see *Jones v. Jones* (1). In *Wiltshire v.*
Rabbits (2) an annuity charged on leaseholds was held not to be a
 chose in action, and *Shadwell V.-C.* held that notice of a mort-
 gage of such an annuity was unnecessary: see also the judgment
 of *Page-Wood V.-C.* in *Roper v. Harrison* (3). The very point in
 this case was decided by *Romilly M.R.* in *Carew's Estate* (4)—a
 case arising on a private Act of Parliament, where certain trust
 funds were by sect. 39 impressed with the character of realty.
 That section is indistinguishable from sect. 22, sub-s. 4, of the
 Settled Land Act, 1882.

The true principle is laid down by *Page-Wood V.-C.* in *Lee v.*

(1) 8 Sim. 633.

(2) 14 Sim. 76.

(3) 2 K. & J. 86, at p. 103.

(4) 16 W. R. 1077.

Howett (1) and *Hughes' Trusts* (2), namely, that notice of a charge is not necessary unless the property charged can only reach the hands of the beneficiary in the form of money. Those were cases where property was subject to a trust for sale, and therefore notice was necessary, as the Vice-Chancellor pointed out. *Foster v. Cockerell* (3) may seem against me, but it has been explained in *Ward v. Duncombe* (4), and must now be treated as applying only to choses in action or interest in lands which can only reach the hands of the assignor in the shape of money: see judgment of Lord Macnaghten, p. 390.

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Carew's Estate (5) governs this case; it is treated as an authority for our contention in Halsbury's Laws of England, vol. xxi, p. 339; Wolstenholme, 10th ed., p. 413; and has never been questioned hitherto. The question of tacking cannot arise, as all three mortgages are merely equitable mortgages.

Macrory, for the Equity and Law Life Assurance Society:—

No notice was given that the intervening mortgage of Hester FitzGerald affected the funds, but only that it affected the policy of insurance. The introduction of the words "inter alia" in the notice was not sufficient to put the company on inquiry. *In re Carew* (5) is not good law. If the funds are to be treated as real estate for all purposes, it would follow that Hester FitzGerald had only a charge for her life, there being no words of inheritance in the mortgage to her. I submit that the mortgages are mortgages of money funds, and notice is absolutely necessary; otherwise the door would be open to all the frauds the prevention of which was a principal ground of the decision of the Courts in *Dearle v. Hall* (6). The funds cannot be treated as land for all purposes. They are only to be treated as land for the purposes of disposition, transmission, and devolution within the settlement, as appears by the latter part of the sub-section. A deeming section is not to be extended beyond the purpose for which it is enacted: *Hill v. East and West Dock Co.* (7); *De Vesci v. O'Connor* (8). The words of the sub-section are "for the purposes of disposition," not "for the modes of disposition."

(1) 2 K. & J. 531.

(2) 2 H. M. 89.

(3) 3 Cl. & F. 456.

(4) [1893] A. C. 368.

(5) 16 W. R. 1077.

(6) 3 Russ. 1.

(7) 9 A. C. 448.

(8) [1908] 1 I. R. 452.

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May 15.

O'CONNOR M.R. :—

This case raises a novel question, and one of very great importance, as it must rule dealings with funds held by the Public Trustee in Ireland.

[His Honor stated the facts as above set out, and proceeded :—]

The form of the notice given to the insurance society of the mortgage to Miss FitzGerald requires special attention. It was a notice that by deed dated 7th April, 1914, Isabella Ronayne, in consideration of £400, as beneficial owner (*inter alia*), granted, conveyed, and assigned to Hester FitzGerald, subject to a prior mortgage dated the 29th April, 1913 (which is the society's mortgage), all that the policy of assurance effected by her in her own name with the society. It is to be observed that it was a notice of a mortgage of the policy, "*inter alia*," without any mention whatever of the subject-matter covered by these general words. Stopping here, I have to consider what such a notice would convey to the mind of the person receiving it. It would, I think, convey this, that the noticed party being interested in the policy was entitled, or ought to be informed, of a dealing with it, but that the dealing, so far as it concerned other property, did not affect the noticed party. I can attach no other meaning to the use of the words "*inter alia*." If a deed conveys specific property, and if by recitals it shows how the title to that property is deduced, and if it has a common title with other property outside the scope of the deed, the deduction of title is often shown by some such recital as this: "and whereas the lands hereinafter mentioned and expressed to be hereby conveyed were conveyed, *inter alia*, to A. B." (the conveying party). The only meaning of this is that the matter in hand only relates to the lands to be conveyed, and that the person taking the conveyance has no concern with those referred to by the words "*inter alia*." So in the present case the notice would in the ordinary course have been read as relating only to the policy as the only part of the transaction which concerned the society. No doubt a very acute mind might be aroused by notice of a dealing with a policy which, as an independent security, was of little or no value, and might be led on to an inquiry whether the dealing did not

also embrace a reversionary estate which was contingent on the event which the policy was intended to cover, and in that way it might have been discovered that the dealing with the policy covered the estate in the funds which had been previously mortgaged to the society. But a notice should be explicit in its terms. It fails in its purpose if it is not. If attention is specially directed to one thing, with only a vague hint of another, it is really only a trap for deception. So in effect it was in the present case. It dealt expressly with only one part of the security comprised in the mortgage—camouflaging (to make use of this inevitable modern phrase)—the substantial part of the mortgage. For this reason I must hold that notice was not given to the Equity and Law Life Assurance Society that Hester FitzGerald had taken a mortgage of the funds vested in the Public Trustee.

Again, no notice at all was given to the Public Trustee of the second mortgage, but a note of the second mortgage was entered up in the record of the matter in the Land Commission Court, in which the lands were sold in ignorance or disregard of the fact that that matter had been completely closed by the final allocation of the funds therein by the transfer thereof to the Public Trustee. This note of course served no purpose whatever. The matter had left the Court; and the Court and the parties interested in the lands had no further concern in it.

So matters stood when subsequently Isabella Ronayne, otherwise Sandes, applied again to the Equity and Law Life Assurance Society for a further advance. This application was acceded to, although previously refused, and it is to be presumed that the reason for granting the application was that as time advanced the value of the contingent estate became greater.

The further advance with the original loan brought the full amount up to the sum of £1413, and by an indenture dated the 10th January, 1916, a further mortgage was given by Isabella Ronayne and her husband to the society of the policy and the funds in the hands of the Public Trustee to secure the increased amount, and notice thereof was given to the Public Trustee. The society's secretary has deposed to the fact that when this mortgage was taken the society had no notice that the mortgage given to Hester FitzGerald affected the fund in the hands of the Public

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Trustee. It is not stated whether inquiry was made from the Public Trustee whether he had got notice of any dealings with the fund other than the original mortgage to the society; but if such inquiry had been made, it must have led to the answer that the Public Trustee had not got any such notice, as, in fact, he had not, so that the case is not affected by the absence of inquiry from the Public Trustee.

No evidence was offered as to what inquiry, if any, was made from the mortgagors at the time the second mortgage was given; but it was not contended that the society was guilty of any negligence in not requiring an assurance, by statutory declaration or otherwise, that they had not dealt with the fund since the execution of the original mortgage. I therefore pass over the point as one not made in argument.

Apart, then, from the special case which was made by reason of the circumstance that the fund in the hands of the Public Trustee was impressed with the character of realty, and which I intend to deal with later on, the matter stands in this way: In order of time there are three mortgages of the fund—1, a mortgage to the society; 2, a mortgage to Hester FitzGerald; 3, a mortgage to the society. The Public Trustee, in whom the fund was vested, received notice of mortgages 1 and 3. He got no notice of mortgage 2. Neither did the society. The society, in the circumstances, claims priority of mortgage 3 over mortgage 2, on the ground that the Public Trustee was given notice of the former and not of the latter. According to the law as settled by *Dearle v. Hall* (1) and *Ward v. Duncombe* (2), this order of priority must be allowed if the property is to be treated as personal estate. Two cogent reasons are given for the rule—one, that if a contrary doctrine prevailed, it would enable a cestui que trust to commit a fraud by assigning, first, to one incumbrancer and then to another, and the later incumbrancer would have no opportunity of ascertaining by any communication with the trustees whether or not there had been a prior assignment; the other, that an assignee, until he had given notice of the assignment, had not done everything that was necessary to complete his title. On this aspect of the case I am therefore prepared to hold that the society's later mortgage takes priority of the earlier mortgage given to Hester FitzGerald.

(1) 3 Russ. 1.

(2) [1893] A. C. 369.

But another view has been presented by the learned counsel for Hester FitzGerald, and it is this: the fund in question was transferred to the Public Trustee as a trustee of the settlement constituted by the deed dated 16th November, 1867, and the will of Charles Sandes for the purposes of the Settled Land Acts, and must for all purposes be considered as land, as provided for by sect. 22, sub-s. 5, of the Settled Land Act, 1882. This section reads as follows:—"Capital money . . . and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission, and devolution be considered as land," &c. Now, the argument is that, as the settled funds are to be considered as lands for all purposes, the priority of the mortgages is regulated on the same principle as if they were mortgages, in fact, of lands; in other words, that priority of time must prevail, because the principle of *Dearle v. Hall* (1) has no application to real estate. The words "for all purposes of disposition, transmission, and devolution" are relied on in support of this argument. It was urged that a mortgage is a "disposition," as undoubtedly it is, and that the mortgages in question being dispositions of real estate, or what must be considered as real estate, did not require notice for their protection. This is a very specious argument, and if it is to prevail it must render most difficult all dealings with equitable interests in funds vested in trustees of settlements for the purposes of the Settled Land Acts. Indeed it must open up a way for the perpetration of all those frauds which it was the object of the rule in *Dearle v. Hall* (1) to guard against.

Let us see, then, what is the true meaning of the words "for all the purposes of disposition" in the twenty-second section. It is obvious that they cannot be taken in their full sense, because if the trust investments cannot be disposed of at all, except as real estate, the trustees in whose names they are invested should be able to transfer the funds by an ordinary deed of conveyance, and be relieved from the obligation of transferring them in the ordinary modes prescribed for transferring Government funds or other such securities. The situation has only to be glanced at in order to see that "disposition" is used in a special sense, and does not

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cover the entire machinery of conveyancing. I think that in order to get at the true meaning of the words "for all purposes of disposition, transmission, and devolution," they must be read in conjunction with the latter part of the section, that is, with the words "and the same shall be held for, and go to the same persons successively, in the same manner, and on the same estates, interests, and trusts as the land," &c. The object of the section was to preserve the beneficial interests in the lands which had been legally converted into money, and the words "for all purposes of disposition, transmission, and devolution" were introduced for the purpose of accomplishing that object. They mean that the persons who had power to dispose of the lands would still have the right of disposition over the funds, and that each of those on whom the lands would have devolved would continue to have the same right of succession, whether as heir-at-law, as tenant in tail, or remainderman.

I do not think that the section as a whole has any greater meaning, and I have pointed out that the extended meaning contended for would be entirely inconsistent with the machinery necessary for the realization and transfer of securities by the trustees. Although the capital money is to be considered land, the securities representing it cannot be conveyed as if they were really land. The ordinary forms of transfer used in connexion with trustee investments must be adopted and followed by registration in books of public companies. The rights against the property remain untouched, but the machinery for its legal transfer has been changed.

If that is so in the case of dealings by the trustees, why should there not be analogous procedure in the machinery of conveyancing by the cestuis que trustent? The trustees must deal with the investments (which are substantially real estate) as choses in action, which they really are. Why should not the cestuis que trustent do likewise? The obligation does not in the least detract from beneficial rights or enjoyment.

For these reasons I am of opinion that a person taking an assignment of an equitable interest in funds in the hands of trustees of a settlement for the purposes of the Settled Land Acts is bound to complete his title by giving notice to the trustees at

the risk of losing priority over a subsequent assignee, just as if the funds were not impressed with the quality of real estate. All the reasons given for the decision in *Dearle v. Hall* (1) apply quite as forcibly to the case of funds impressed with the character of realty when in fact there is no real estate as to choses in action which are unclothed in any fictitious garb. I do not think that there is any authority (except one, which I shall deal with) inconsistent with this.

I was referred to many decisions by counsel for Hester Fitz Gerald in his able argument, and I will go through them for the purpose of showing that they do not apply to the present case. I will dismiss *Jones v. Jones* (2) and *Willshire v. Rabbits* (3) with the observation that the mortgages with which they were concerned were mortgages of equitable interests in real estate unaffected by any trust for sale. It was held in each case that the priority of the mortgages was regulated by the order of time in which they were executed, the subjects of the mortgages being real estate, and not choses in action. Obviously these cases have no bearing on the present one.

The next case cited was *Roper v. Harrison* (4). The same observation applies. The contest for priority was between mortgagees of real estate, over which there was a power of sale. The power had not been exercised when the mortgages were executed. It was held that the rule in *Dearle v. Hall* (1) had no application, because the mortgages were mortgages of real estate which had not been converted at law or in equity.

I now come to *Carew's Estate* (5)—a decision of Lord Romilly in the year 1868. There a fund vested in trustees in pursuance of a private Act of Parliament was held upon trusts applicable to real estate, and by a section of the Act it was provided that the trust stock should for the purposes of the devolution, transmission, vesting, disposal, and enjoyment thereof, and as between the several persons and the real and personal representatives of the several persons respectively from time to time interested therein under the trusts thereof by this Act declared, be deemed in equity

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(1) 3 Russ. 1.

(2) 8 Sim. 653.

(3) 14 Sim. 76.

(4) 2 K. & L. 86.

(5) 16 W. R. 1077.

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of the nature of real estate, and not of the nature of personal estate. The owner of the life estate in the funds effected several mortgages thereof, and only one of the mortgagees gave notice to the trustees. Relying upon this, he claimed priority over the mortgagees who were prior in point of time, but had not given any notice to the trustees. Lord Romilly held that notice was immaterial, and that the mortgagees ranked in order of date. This must be admitted to be a point-blank decision in favour of the contention of Hester FitzGerald in the present case, but I am bound to say that it does not impress me. The date of the decision, the fact that it does not appear to have been given after any deliberation, and the entire absence of any comment on the reasons for the judgments in *Dearle v. Hall* (1), which are just as applicable to choses in action impressed with the character of realty as choses in action which are such both in law and equity, deprives the case of that authority which ought to make it a ruling one in transactions of the utmost importance, and which must as time goes on increase in number. Lord Romilly disposes of the case in a very few words. He referred to the section of the private Act which made the trust fund real estate as far as possible, and gave it as his opinion that the charges should be treated as charges on real estate, meaning thereby that they should rank in order of time irrespective of notice to the trustee. In this short judgment he entirely ignored the view that the purport of the section was to preserve the beneficial interests under the settlement just as if the fund was real estate, and that this would not be in the least prejudiced by the necessity to adopt the machinery of conveyancing applicable to choses in action. I am not aware that *Carew's Estate* (2) has received approval in any subsequent judgment.

On the other hand, it has been held that in the case of real estate subject to a trust for conversion, under which the beneficiary was only entitled to his interest in the shape of money (*Lee v. Howlett* (3)), and in the case of a chargeant, who is only entitled to call upon the trustee of the estate to pay him in money, that notice is essential to a complete assignment, and to preserve priority. But these cases do not apply.

(1) 3 Russ. 1.

(2) 16 W. R. 1077.

(3) 2 K. & I. 531.

Foster v. Cockerell (1), in which it was held that notice of an assignment was necessary, is a case which has been much discussed, and many times condemned as obscure. Lord Macnaghten in *Ward v. Duncombe* (2) shows how it has been misunderstood, and finally disposes of it by saying that it has come to be treated as applying only to assignments of choses in action, or of such interests in real estate as can only reach the hands of the beneficiary or assignor in the shape of money.

None of these cases, except *Carew's Estate* (3), touches assignments of choses in action, impressed with the character of real estate, when in fact there is no real estate in existence. I do not think that I ought to follow *Carew's Estate* (3), which, in my opinion, is wrong, and thus open up a way for frauds in the disposal of interests in those numerous trust estates vested in the Public Trustee in Ireland and trustees for the purposes of the Settled Land Acts. Any such decision would be fraught with peril for any person taking an assignment of beneficial interests in trust funds.

I feel bound to hold that the Equity and Law Life Assurance Society have priority for both their mortgages over Hester FitzGerald, and I must so declare.

I think that the proper order as to the costs is that the Public Trustee should have his costs as trustee costs out of the fund, and that the society should have their costs with their demand.

Solicitor for the Public Trustee: *Charles St. George Orpen*.

Solicitor for Hester FitzGerald: *Graham A. Goold*.

Solicitors for the Equity and Law Life Assurance Society:
Whitney, Moore, & Keller.

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(1) 3 Cl. & F. 456. (2) [1893] A. C. 369, 390. (3) 16 W. R. 1077.

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IN RE LANE JOYNT.

Feb. 9.
March 30.

Solicitor—Costs — Withdrawal of retainer of solicitor — Costs in probate matters—R. S. C., 1905, Order 65, r. 90, App. S, Part III, sect. 1.

A solicitor, on the instructions of a client, incurred costs, and took all the necessary steps to obtain probate. Before the grant was extracted the client withdrew his retainer, the grant being subsequently extracted by another solicitor.

Held, that the solicitor first employed should, on taxation, be allowed his charges for all actual work done, but that the fees for probate under seal and extracting should be allowed only to the solicitor who actually extracted the grant.

SUMMONS to review taxation.

A. Lane Joynt, who was solicitor for the executor of the will of Thomas Dwyer, and had been instructed to obtain probate, incurred certain costs, and took all necessary steps prior to lodging the papers for the grant and paying the duty. The client neglected to furnish the necessary funds for the duty, and withdrew his retainer.

On taxation the Taxing Master allowed certain items, but disallowed the fee prescribed by R. S. C., 1905, Orders 65 and 90, App. S, Part III, sect. 1, for probate under seal and extracting the grant. Mr. Joynt lodged objections, which were overruled by the Taxing Master.

W. G. Gibson K.C. and *H. Hamilton*, for A. Lane Joynt, Solicitor.

Martin Connolly, for the executor of the will.

March 30.

POWELL J. :—

This was a summons on behalf of Mr. Lane Joynt for a review of the taxation of certain items in a bill of costs, and for a declaration that the decision of the Taxing Master upon the objections of Mr. Lane Joynt was wrong, and that the amount of the items referred to were proper charges, and should be restored.

[The learned Judge having dealt with certain items in the bill of costs, proceeded to deal with item 39, which was fee for "probate under seal and extracting grant."] This item, having been disallowed, Mr. Lane Joynt in his objection to the disallowance, states as follows:—"Regarding this item, I contend that it is a charge to which I am properly entitled, I having done all the necessary business for which the fee is allowable. This fee is a general extra remuneration fee, varying with the amount of the assets, and given to the solicitor to augment the small fees allowable for the preparation of oath, and schedule of assets, which do not vary between assets above £200 or any larger sum. If this fee is only allowable on the extracting of a grant, it would be open to any client when a solicitor had done all the work, save to send a cheque to the Inland Revenue and lodge the fully completed papers, to discharge the solicitor's retainer and pay the duty himself, and lodge the papers, and thus deprive the solicitor of the fee fixed by the rules for his work and labour. There is a separate fee varying with the amount of the assets for 'Extracting,' hence the fee in schedule, 'Fee on Grant,' cannot cover the extracting of the grant."

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The ruling by the Taxing Master as to this item and another is as follows:—"I overruled objections to disallowance of these items. Mr. Joynt has been allowed the proper fees for every item of work he did while acting as solicitor for the executor, and this claim at 39 and 40 was not earned or payable until the grant was extracted and issued. In this case the grant had not issued, and the necessary papers leading up to the issue of the grant had not been even lodged in the proper office, and are, it is alleged, retained by Mr. Joynt pending payment of his costs. A solicitor is always liable to be discharged by his client, and can only receive his costs and fees for the work he has done up to the discharge of his retainer."

I understand that in the present case the only matter that remained to be done prior to lodging the papers for the grant by Mr. Joynt was to pay the duty, and he had requested his client to furnish him with the funds necessary to enable him to do this; but his client, instead of furnishing him with these funds, withdrew his retainer. I think there is a great deal to be said for

Powell J. Mr. Lane Joynt's contention, and I think it is extremely hard
1920. on a solicitor when he has done substantially all the work
In re requisite to obtaining the grant that he should have his retainer
LANE JOYNT. withdrawn for no cause, and that the solicitor who succeeds him
may perhaps receive the benefit of the payment of the sum in
question. But that is not the matter which I have to determine.
I have to see whether the Taxing Master was wrong in the ruling
which he has made.

The item in question is to be found in Part III of Appendix S to the Rules of the Supreme Court, 1905. Costs in non-contentious probate matters, sect. 1, "Probate under Seal." The fee, apparently, is proportionate to the amount of the assets, and varies from a sum of one shilling, where the effects are sworn under £5, to the sum of £43 8s. 9d., where the effects are sworn under £500,000. And for every additional £100,000, or any fractional part of £100,000, under which the personal estate is sworn, in addition to the above fees, a further fee for probate under seal of £3 2s. 6d. The section provides a fee for oath of executor, and attendance on the party being sworn; fee for extracting; for instructions for grant, including perusal of the will and codicils, proportionate to the amount of the gross assets; for engrossing and collating will; for attendances, after the first attendance, where there are two or more executors, proportionate to the assets, and then, in addition to the foregoing fees, there is to be allowed for attending at the Inland Revenue office to pay the stamp duty, if the effects are sworn under £300, a fee of 6s. 8d.; if sworn at £300 or upwards, a fee of 13s. 4d.; and a further provision as follows:—"For instructions for work under the Finance Act, 1894, in relation to non-contentious probate business, such sum as the Taxing Master shall think reasonable, but such sum shall not exceed £5, unless the Taxing Master shall, on special grounds to be stated by him in writing, so certify." This gives a very wide discretion to the Taxing Master where the work to be done under the Finance Act, 1894, is complicated and troublesome. Apparently the Taxing Master has allowed Mr. Lane Joynt in respect of all these items except for "Probate under Seal," which in the present case would amount to the sum in question. It is not easy to discover what the fee

“Probate under Seal” really means, or for what particular work of the solicitor it is provided. I asked the Taxing Masters to furnish me with a memorandum showing what the practice in the Taxing Masters’ office is and has been in regard to this item, and they have furnished me with the following statement :—

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“Reply of the Taxing Masters to the memorandum.

The fee set out in the column headed ‘Probate under Seal’ is payable only to the solicitor who produces to the Taxing Masters the original grant of probate (or in case of intestacy the original letters of administration), and which bears on the face of it a statement that such grant has been extracted by him.

In case a solicitor on instructions from his client prepares all the necessary affidavits, and takes all the necessary steps to obtain a grant of probate, but is removed as such solicitor before the papers are lodged in the proper office, or probate extracted, the practice of the taxing office is, and has always been, to allow such solicitor charges in detail for all the actual work done by him, including in such charges the proper fee for instructions for the grant and fee for work done under the Finance Act; but the fees provided by the schedule for ‘Probate under Seal’ and extracting are only allowed to the solicitor who actually extracts the grant, and whose name appears on the face of the probate or administration as having done so.”

I do not feel at liberty, nor have I sufficient materials in the present matter, to decide that this practice is wrong, and therefore I must uphold the decision of the Taxing Master in reference to this item.

Solicitor for A. Lane Joynt: *A. Lane Joynt.*

Solicitor for the executor: *L. J. Ryan.*

D. M. S

Powell J. JOSEPH MOORE AND PHILIP COURTNEY, PLAINTIFFS;
 1920.
 May 12. MARY MOORE AND OTHERS, DEFENDANTS.
 June 8. (1919. No. 340.)

*Will—Construction—Specific bequest—Misdescription—Selection—
 Uncertainty.*

A testatrix, who owned eight leasehold houses in S. Terrace numbered 3 to 10 inclusive, by her will directed her executors to sell "the seven houses I hold in S. Terrace," and hold the proceeds upon certain trusts.

Held, that the eight houses passed under the bequest.

ORIGINATING SUMMONS.

Annie Moore by her will dated 11th September, 1912, appointed the plaintiffs her executors and trustees, and, inter alia, directed them to sell "the seven houses I hold in Sydney Terrace, Blackrock," and to hold the net proceeds on certain trusts for her nephews and nieces, and bequeathed the residue of her property in equal shares to the Superioress of the Convent of the Holy Faith, Glasnevin, and the Superioress of the Sisters of the Assumption, Kingstown, to be applied by them respectively to the charitable purposes in the will mentioned.

The testatrix owned eight leasehold houses in Sydney Terrace, Blackrock, numbered 3 to 10 inclusive.

The summons was brought by the executors and trustees of the will for an order determining (inter alia) whether the above-mentioned direction operated as a gift of all the said eight houses in Sydney Terrace, Blackrock, or whether it conferred on the plaintiffs or others a power to select seven out of the said eight houses to be sold and the proceeds held on the said trusts, or whether the gift was void for uncertainty.

M'Cutcheon, for the executors.

M'Cann K.C., for the defendant Mary Phelan, Superioress of the Convent of the Holy Faith, Glasnevin:—

No question of selection arises; the testatrix has selected some particular property, but she has failed to describe it sufficiently

clearly, and the gift is void for uncertainty: *Asten v. Asten* (1); *Richardson v. Watson* (2). The maxim "*falsa demonstratio non nocet*" only applies when the description is partly true and partly false. Here the whole description is true, because the testatrix had seven houses in Sydney Terrace: *Webber v. Stanley* (3).

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Russell, for the defendant Mary Moore, a niece of the testatrix:—

The testatrix intended to give all the houses which she had in Sydney Terrace, and arrived at the number by subtracting three from ten. If seven houses only pass, the cestuis que trustent are entitled to select them. He referred to *Sampson v. Sampson* (4); *Richards v. Patteson* (5); *Tapley v. Eagleton* (6).

Vaughan Wilson, for the defendant Agnes Falconer, Superioress of the Sisters of the Assumption, Kingstown:—

The case does not fall within any of the classes of cases in which the false description has been rejected; in all those cases the description which was rejected was qualitative, not quantitative.

POWELL J. [His Lordship having stated the above facts, proceeded:—]

The case was very fully argued by counsel, and I should like to express my appreciation of the very clear and forcible argument put forward by Mr. Vaughan Wilson.

The first matter which I think I must determine is what the intention of the testatrix was in making the bequest in question. I have formed the very clear opinion that the testatrix intended specifically to devise and bequeath to her executors and trustees all the houses which she held at the date of the will in Sydney Terrace, Blackrock, upon the trusts declared as a provision for the children of her brothers. I am clearly of opinion that she did not intend to exclude from the bequest any one of the eight houses which she then held in Sydney Terrace. The question is, am I precluded by the words of the bequest from giving effect to what I believe to have been the intention of the testatrix? In my opinion, in dealing with the houses in Sydney Terrace, the testatrix erroneously, that is, through a mistake, stated the

(1) [1894] 3 Ch. 260.

(2) 4 B. & Ad. 787.

(3) 16 C. B. (N. S.) 698.

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(4) L. R. 8 Eq. 479.

(5) 15 Sim. 501.

(6) 12 Ch. D. 683.

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number of the houses which she held in Sydney Terrace, Blackrock, to have been seven instead of eight; and the question is, having come to the conclusion that it was a mistake to so state the number as seven instead of eight, does that mistake render the whole bequest void for uncertainty? I may say at once that I do not think that this is a case in which the doctrine of selection applies. It is not in my view a case of a gift comprising a definite portion of a larger quantity, but is the case of a mistake in one word in describing the gift intended to be made. I think that the question is whether the beneficiaries are entitled to the eight houses, or whether the bequest is void for uncertainty. Mr. McCann and Mr. Vaughan Wilson relied strongly upon two cases. The first one cited is *Asten v. Asten* (1). In that case the testator had four houses, and, having four sons, specifically devised them to his four sons, one to each. He purported to leave each house to a son, and to designate each by a number. Unfortunately the numbers were left blank in the will; and in fact the houses were not numbered at the date of the will. Mr. Justice Romer held that he could not come to the conclusion that the testator intended to give one of the four houses to each son without any selection by the testator, but that, on the contrary, it was clear from the will that what the testator intended was to give a particular house to each son, and not to give any right of selection to any son; but that, owing to the houses not being numbered at the date of the will, and their description being indistinguishable, he could not tell from the will which house the testator intended to give any of the sons, and he felt compelled to declare the bequest void for uncertainty.

In the present case, in my opinion, the testator intended to give her houses in Sydney Terrace, Blackrock, to her trustees upon the trusts set out. She stated that she held seven houses altogether, whereas in fact she held eight; and in my opinion the question is, as I have said, whether the statement that she held seven—a mistaken statement as I hold—renders the bequest void for uncertainty.

The next case relied upon by Mr. McCann was the case of *Webber v. Stanley* (2), a decision of a very strong Court, consisting

(1) [1894] 3 Ch. 260.

(2) 16 C. B. (N. S.) 698.

of Erle C.J., Williams, Willes, and Keating JJ. There was an appeal taken from the decision, but apparently the parties agreed to a compromise, and the appeal was never heard; it is, nevertheless, a case of great authority. In that case a testatrix devised certain property, which she described as being in the County of Hants, to her nephew. The mansion house and a portion only of the lands forming the property were in the County of Hants, the residue being in the adjoining County of Wilts. It was held that as there was a property which every part of the description in the will fitted, and on which every word had full effect, the devise must be limited to so much of the land as was locally situated within the County of Hants, there being no intention expressed of giving property situated out of the County of Hants.

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I do not think that the decision in that case governs the present case. In the present case the testatrix is dealing with a property situated in one place, namely, Sydney Terrace, Blackrock, and in the view which I take she intended that the bequest to her trustees should include all the houses which she held in Sydney Terrace, Blackrock. But I am bound to say that I think some of the decisions referred to in the argument, for example, *Gore v. Langton* (1); *Mosley v. Massey* (2); *Hart v. Tulk* (3); *Doe d., Bean v. Halley* (4), afford examples of the lengths to which the Courts have felt at liberty to go in order to control the meaning of the actual words of a will so as to carry out the intentions of a testator.

In *Mellish v. Mellish* (5) the decision of the Master of the Rolls shows that a will cannot be varied on the ground of mistake unless the alleged mistake is clearly inconsistent with the intention; but *Philipp v. Chamberlain* (6)—a decision of the same Judge—shows that a mistake in a will will be corrected on a clear intention appearing on the whole will. In that case a legacy of £30,000 was held to be a mistake for £20,000. Mr. Justice Bailey in *Beach v. Lord Jersey* (7) said: "I have always taken the rule to

(1) 2 B. & Ad. 680.

(2) 8 East, 149.

(3) 2 De G. M. & G. 300.

(7) 3 B. & Ald. 550.

(4) 8 T. R. 5.

(5) 4 Vesey, 44.

(6) 4 Vesey, 50.

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be that where a testator has sufficiently described the property intended to be devised so as to leave no fair ground for doubt as to the property, that then the addition of another circumstance with a view to identifying it will not limit and restrain the first devise unless it clearly appears that the testator so intended."

No doubt in the present case we have the circumstance of the description of the property as consisting of seven houses and not eight occurring in the earlier part of the bequest, but Lindley M.R., in *Cowan v. Truefit* (1), said: "I must, however, protest against the way in which the doctrine was stated by the appellant's counsel, that the maxim *falsa demonstratio non nocet* only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous. It is a misapprehension." He referred to *Day v. Trig* (2), where a testator devised all his freehold houses in Aldersgate Street, London, having in fact only leasehold houses there, and where it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass. He goes on to say that to limit that doctrine in the way counsel suggested is to deprive it of half its merit. The rule is a rule of good sense. If the language is clear, but does not fit because of some word which had been inserted, then, if it is possible to reject the part that makes it inapplicable, the Court will do so. Lord Justice Rigby said that in applying the doctrine of *falsa demonstratio non nocet* it was immaterial in what part of the sentence the *falsa demonstratio* was found. He said that to adopt the argument to the contrary was to reduce a very useful rule to a mere technicality. The case did not turn upon the doctrine of *falsa demonstratio*, but the Court held that there had been a common mistake, and the lease was ordered to be rectified to give effect to the intention of the parties, and I cite it for the purpose of showing that it is immaterial in what part of the description of the property devised the *falsa demonstratio* occurs.

In *Mellor v. Daintree* (3), which was a case of supplying an omission in a will by inference, Mr. Justice North said that

(1) [1899] 2 Ch., at p. 311.

(2) 1 P. Williams, 286.

(3) 33 Ch. D. 198.

several cases had been referred to, but that the principle which would guide him was to be found in the case of *Key v. Key* (1), where Lord Justice Knight Bruce had said: "In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly." I find that the learned Lord Justice in *Ware v. Watson* (2) said that he adhered to this statement, and repeated it. I should like to refer to another statement in the judgment of the Lord Justice in *Ware v. Watson* (2): "The length of time that the argument of this cause occupied has been greater than I should have considered possible. As Mr. Justice Buller said in *Doe v. Lyde* (3), nothing, in my opinion, can raise a doubt in this case but overwhelming it with a number of cases."

In the present case the argument has been short and clear and concise, and has not occupied a moment more than was necessary, but I am impressed by the warning of Mr. Justice Buller, and I do not wish to raise a doubt in this case by overwhelming it with a number of cases; but I should like to refer to a passage in the judgment of Lord Justice James in *Travers v. Blundell* (4), in which he said: We are dealing with the case of a gift of an entire thing followed by an insufficient enumeration of the particulars of which that entirety consists—a *falsa descriptio quae non nocet*. It is suggested, he says, that it is not to be imputed to the testator that he made a blundering omission of the two closes, but the very existence of the rule is based on the fact that people, or people's scribes, do constantly blunder in their description and enumeration of the particulars of their property. It may be, however, he says, that the context and surrounding circumstances would show that what appears to be a blundering enumeration of particulars

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(1) 4 De G. M. & G. 73.

(3) 1 T. R. 593.

(2) 7 De G. M. & G., at p. 259.

(4) 6 Ch. D. 436.

Powell J. was a designed limitation of the gift itself, but in the case referred to he held that this was not so.

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In the present case I am satisfied that the statement that the houses held by the deceased in Sydney Terrace, Blackrock, were seven and not eight was not a designed limitation of the gift itself, but was a blundering statement either by the testatrix herself or by the person who actually drew the will.

There are several other cases and numerous dicta of eminent Judges, from Cro. Jac. Reports, and I have no doubt long before that date, down to *In re Battie-Wrightson's Estate* (1), which show the lengths to which Courts will go to prevent mistakes and ambiguities being allowed to frustrate the intention of testators, and which, in my opinion, justify me in this case in giving effect to what I believe to have been the intention of the testatrix, and to disregard the blundering statement to which I have referred; and, that being so, I am of opinion that the eight houses in Sydney Terrace pass under this bequest.

Solicitors for the plaintiffs: *John Clark & Co.*

Solicitors for Mary Phelan: *O'Connell & Son.*

Solicitor for Mary Moore: *M. Good.*

Solicitor for Agnes Falconer: *Cartan O'Meara.*

M. G. E.

(1) Now reported 36 T. L. R. 693.

ELIZABETH ARMSTRONG, APPLICANT.

(FOLIOS 2477 AND 3852. CO. LONGFORD.)

*Ross J.
Land Judge.
1920.**May 14, 18.**Joint tenancy—Severance.*

An agreement between E. and S., joint tenants in fee of land, that E. should stand possessed thereof for the term of ten years, she paying thereout to S. an annuity, and also a yearly payment to G. H. B. and all outgoings :

Held, to effect a severance of the joint tenancy.

Cowper v. Fletcher (6 B & S. 469, 472; 13 W. R. Q. B. 740) discussed.

MOTION on behalf of Elizabeth Armstrong for the decision of the Court on the following questions reserved by order of the Registrar of Titles dated 15th April, 1920, viz.:—1. Was a joint tenancy created in the residue of his estate by the devise thereof contained in the will of George Henry Barrett? 2. If so, did the agreement dated the 9th day of April, 1910, effect a severance of the said joint tenancy?

The material facts were as follows:—

By his will dated 26th February, 1905, George Henry Barrett devised and bequeathed the house of Lislea with the furniture to his sisters Elizabeth and Sophia, to hold jointly until either of them should marry, when, unless they agreed to act otherwise, the one so married and her husband should cease to have any interest in the house and its contents. The testator devised and bequeathed the residue of his real estate, which consisted of the lands of Glanmore, and his personal estate to the said two sisters, and appointed them residuary legatees and devisees. The said lands were by the will charged with £400 in favour of testator's brother, Graham Henry Barrett. The testator died on 24th July, 1907. On the 9th June, 1909, the said Elizabeth Barrett married Noble Armstrong, and ceased to have any further interest in the said house of Lislea under the will.

By an agreement dated 9th of April, 1910, made between the said Elizabeth Armstrong and Sophia Barrett, reciting the

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said will, it was agreed that the said Elizabeth Armstrong should from the 1st of May, 1910, stand possessed of both the said holdings of Glanmore and Lislea for the term of ten years, she paying thereout to the said Sophia Barrett an annuity of £30 per year by half-yearly payments on 1st May and 1st November, and also a yearly payment of £25 per year during the said term to Graham Henry Barrett by half-yearly payments, and also paying thereout all outgoings, including the Land Commission annuity and interest in lieu of rent, and it was further agreed that Sophia Barrett should have and exercise on any occasion she should think fit the right and enjoyment of Lislea House and the furniture therein, and the bed and sitting-room, without any cost or charges whatever. Sophia Barrett died on the 10th of October, 1918. The lands are held in fee-simple.

A. C. Meredith K.C., for Elizabeth Armstrong :—

As to the first question, the rule of law is that words pointing to severalty of interest are necessary to create tenancy in common : *Morley v. Bird* (1); and there are none such in this case. As to the second question—what is the nature of the agreement of 9th April, 1910? was it simply an agreement whereby Elizabeth was made bailiff, or was it a letting by Sophia of her moiety to her sister? It does not purport to be a letting. The money payment to Sophia is called an annuity, and there is nothing to indicate, rather everything to negative, an intention to create a tenancy. The agreement implies in its terms that the status quo should continue, save so far as it is modified by Elizabeth collecting the rents, paying the outgoings, and paying the £30 per annum, presumably the estimated one-half of the net residue, to Sophia. One joint tenant may appoint the other bailiff: *Coke Litt.*, 186 *a*. But assume it was a letting, would a letting in a case like the present, where the interest of the joint tenants was not a chattel real but a fee-simple, effect a severance? No. *Halsbury* xxiv, p. 205; *Preston Abst.*, vol. ii, pp. 58 et seq.; *Coke Litt.*, 184 *b*, 185 *a*, 186 *a*. It would be different, no doubt, if the interests of the joint tenants had been a chattel real: *Coke Litt.*, 192 *a*; *Preston Abst.*, vol. ii, p. 60; *Picard's Case* (2). The

(1) 3 Vesey, 628.

(2) 2 Leon. 159.

passage in Coke explains the reason of the distinction. *Clerk v. Clerk* (1) is not contra, though it is difficult to understand. There is a dictum of Blackburn J. to the contrary in *Cowper v. Fletcher* (2), but it was extra-judicial, and the authorities were not before the Court. The marriage of Elizabeth did not effect a severance: *Palmer v. Rich* (3). The recital in the agreement of 9th April, 1910, is not a recital of an agreement between the sisters, but of the effect of the devise in the will of G. H. Barrett. It does not indicate any intention to alter the effect of that devise, whatever it was.

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Poole, for the trustees of the will of Sophia Barrett, deceased:—

The agreement of 9th April, 1910, in itself should be treated as a severing of the property and dividing it between the two sisters. It was either a qualified sale for ten years or a letting for ten years. I do not contend that it is a letting, because there is apparently no agreement by one to hold the land from the other within the meaning of the Landlord and Tenant Act, 1860. There is nothing in the document to suggest that Elizabeth was to be a bailiff or agent. Bacon's Abridgment, vol. iv, 493, referring to Coke Litt., 188 a, Tudor, 1879 edition, 890, quoting Littleton's Tenures, 302, refers to *Cowper v. Fletcher* (2). The report of that case in the Weekly Reporter (4) contains a passage in the judgment of Blackburn J. not referred to in Best and Smith's reports. This dictum of Blackburn J. is the most modern authority on the question, and is a clear expression of the view of that learned Judge that a transaction such as the Court has here to deal with operated as a severance for all purposes of joint tenancy.

Ross J. stated the facts as above, and proceeded:—

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No question now arises in respect of the first matter. It is plainly a joint tenancy. As Elizabeth Armstrong has survived Sophia, if the joint tenancy has not been severed, she takes it all by survivorship; if it has been severed, then she and Sophia Barrett's devisee take share and share alike in the residue as tenants in common.

(1) 2 Ver. 323.

(2) 6 B. & S. 464, at p. 472.

(3) [1897] 1 Ch. 134.

(4) 13 W.R. Q. B. 739.

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For Elizabeth Armstrong it is contended that the agreement does not constitute a letting; that the relationship of landlord and tenant does not exist between them; that Elizabeth Armstrong was merely a bailiff; that under the agreement she was to receive the rents and profits to pay annuity to her sister, and to pay certain things thereout and to keep the residue; that she was bound to account; that she was merely bailiff or agent to pay the £30 annuity and other outgoings; that this relationship negatives severance; and that the interest in the residue is only modified to the extent to which of necessity it is modified by the agreement, and no further.

I think that this is an artificial and strained construction of the agreement, and that it is in substance a lease for a term of ten years, subject to certain charges and conditions. The agreement is either a partial alienation or a letting. A partial alienation does effect a severance; but, assuming it to be in substance a letting for ten years, does this amount to a severance? If one of two joint tenants assigns his share to a third person, this destroys the unity of title and creates a severance, and creates a tenancy in common between the assignee and the other joint tenant: Littleton's Tenures, s. 292. But where one of two joint tenants in fee creates a lease for years, it appears that such lease is binding on the other joint tenant after the death of the lessor; but does it effect a severance?

In the case of a term of years held in joint tenancy a lease by one joint tenant for a term less than the residue does sever the joint tenancy. So it has been laid down in Coke Litt. (s. 289, s. 319); but why this should be so is far from clear. It would seem reasonable when an act is done by either joint tenant inconsistent with the chief characteristic of a joint tenancy, namely, survivorship, that such an act should effect a severance. Now a lease must effect the survivorship to some extent, because it is binding after the death of the lessor. We are not, however, left to depend on the ancient authorities, because the matter was considered by Lord Blackburn in the case of *Couper v. Fletcher* (1); and he expressed the opinion that the effect of making a separate demise does sever a joint tenancy.

I am of opinion that the agreement referred to did effect a severance, and direct the question to be answered accordingly.

Solicitors for the parties: *White & White.*

J. B. B.

ROSE RICE *v.* MICHAEL BEGLEY AND PETER BEGLEY. *Powell J.*

(1918. No. 820.)

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June 9, 23.

Statute of Limitations—Possession—Bailiff for infant—Change in character of possession—Evidence.

S. B., the owner of lands held by him as a yearly tenant, died in 1876 intestate as to those lands, leaving a widow and seven children, among whom were the plaintiff R. R., born in 1869, M. B., born in 1862, and P. B., born in 1864. At the date of the death of S. B. his widow and children were living on the lands. After the death of S. B. his widow farmed the lands, and continued to live on the farm until her death in 1918. In 1913 she had assigned all her interest in the lands to P. B.

The plaintiff continued to live on the lands till 1898, when she married, and went to live elsewhere. M. B. continued to live on the lands until 1901, when he married and went to live elsewhere; from 1878 to 1901 he assisted the widow in farming the lands; in 1911 he assigned his interest in the lands to P. B. P. B. continued to live on the lands until the present proceedings; for some years after 1880 he assisted the widow to farm the lands, and subsequently farmed the lands himself. Until after the death of the widow, the plaintiff was not aware that she was entitled to any share of the lands under her father's intestacy.

The plaintiff claimed administration of the estate of S. B., and that P. B. be declared a trustee for her of her share of the lands: *Held*, that the widow and P. B. respectively entered into possession of the lands as to the plaintiff's distributive share thereof as bailiffs for the plaintiff, that their position as such was not changed by the plaintiff's marriage and departure from the lands without making any claim to her share, and that her right was not barred by the Statute of Limitations. The onus is upon the person alleging change in the character of the possession relied upon.

In re Maguire and M'Clelland's Contract ([1907] 1 I. R. 393) distinguished.

ACTION for administration of the personal estate of Stephen Begley, claiming that all proper directions be given, and accounts taken, and that the trusts of his will might, as far as necessary, be carried into execution, and that the folio of the lands of Roskeagh, formerly in possession of Stephen Begley, as entered in the record of the Local Registration of Title Office, should be amended by striking out the provision that the lands were free from equities;

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that the defendant Peter Begley might be declared a trustee for the plaintiff of her share of the lands as one of the next-of-kin of Stephen Begley, deceased. A like declaration in favour of the plaintiff was claimed as against the defendant Michael Begley, who was sued as the personal representative of Stephen Begley, deceased.

The defendant Michael Begley has not filed any defence in the action, although an appearance was entered for him.

Stephen Begley, deceased, was at and prior to his death possessed of part of the lands of Roskeagh, in the County of Louth, containing 84 acres 3 roods and 39 perches, held by him as tenant from year to year, at a yearly rent, and he was also possessed of stock, crops, chattels, and effects, and a policy of assurance on his life effected with the Scottish Amicable Assurance Co. for the sum of £500. He made his will on the 28th July, 1870, whereby he bequeathed all his property of which he might die possessed to his executors and trustees upon trust, immediately after his death, to pay to his wife Rose Begley the sum of £300 sterling, and to hand over to her all his "farming stock," cattle, and growing crops for her own sole use and benefit, and also the policy of assurance on his life with the Scottish Amicable Assurance Co. for the sum of £500, and he directed that the proceeds of the said policy should, immediately after his death, be raised and invested by his executors for the benefit of his children as therein provided, and that the proceeds of such policy should be divided equally amongst all his children when they should come of age. The testator appointed his wife guardian of his children, and he appointed the Rev. Peter McArdle, P.P., and Daniel McDonald and Arthur McDonald his executors. By his said will he did not dispose of the beneficial interest in the lands, and it is admitted that as regards these lands the deceased died intestate. The testator died on the 20th January, 1876, and probate of his will was granted to Daniel McDonald and Arthur McDonald on the 5th May, 1876. The Rev. Peter McArdle never proved the will or acted as executor. Daniel McDonald died before Arthur McDonald, and the latter died intestate on the 23rd May, 1895, without having administered the estate. On the 15th September, 1910, administration of the personal estate of the

deceased, left unadministered by Daniel McDonald and Arthur McDonald was, with the said will annexed, granted to Michael Begley, one of the defendants.

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Stephen Begley, on his death, left him surviving his widow Rosé Begley, and the following seven children, namely:— Mary Anne Begley, then aged eighteen years; Catherine Begley, then aged sixteen years; the defendant Michael Begley, then aged fourteen years; the defendant Peter Begley, then aged twelve years; Elizabeth Begley, then aged nine years; Rose Begley, the plaintiff, then aged seven years; Bridget Begley, then aged four years.

The testator's widow and all these children were residing on the lands at the time of the testator's death.

Mary Anne Begley married in 1882, when she ceased to reside on the lands. Catherine Begley married in 1890, when she ceased to reside on the lands. Michael Begley married in 1901, when he ceased to reside on the lands. Elizabeth Begley married in 1894, when she ceased to reside on the lands. Rose Begley, otherwise Rice, the plaintiff, married in 1898, when she ceased to reside on the lands. Bridget Begley resided on the lands until she died in the year 1884, an infant, intestate, without ever having been married.

From the date of the death of Stephen Begley, the deceased, Rose Begley, his widow and guardian of his children, is stated to have worked the lands alone up to the year 1878, from which date Michael Begley assisted her in working the lands until he ceased to reside on them in 1901. The defendant Peter Begley also assisted in the working of the lands from about the year 1880, and continued to work the lands down to the present date. Rose Begley, the testator's widow, continued to reside on the lands until her death on the 28th April, 1918.

By fiat of the Irish Land Commission dated 27th June, 1907, the fee-simple of the lands was vested in Rose Begley, subject to an annuity of £51 16s. 2d. The ownership was registered under the Local Registration of Title (Ireland) Act, 1891, subject to the rights or equities (if any) arising from the interest vested in Rose Begley, widow, being deemed to be a graft on her previous interest in the lands, or arising in any other manner from the existence of such previous interest.

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On the 7th October, 1910, Michael Begley, as plaintiff and claiming as the administrator of the personal estate of Stephen Begley, deceased, and as a creditor and as one of the next-of-kin of the deceased, issued an originating summons to administer the personal estate of Stephen Begley, in which proceedings Rose Begley, the widow, and Peter Begley were defendants. An order was made on the 24th November, 1910, in the Court of the Master of the Rolls, declaring that the trusts of the will of the deceased ought to be performed and carried into execution, and the usual accounts and inquiries taken and made. If these proceedings had been continued, there would, of course, have been a decision as to the rights of the plaintiff and her sisters in this action in regard to the farm, and in my opinion it was the duty of Michael Begley as administrator *de bonis non* to have proceeded in the regular way; and I have no doubt that the rights of the plaintiff to a distributive share of the value of the farm would have been established, having regard to the nature of the possession of Rose Begley, Michael Begley, and Peter Begley. But this decision would not have suited these people, and it is quite apparent to my mind from what subsequently happened that the rights of the plaintiff were entirely ignored.

None of the inquiries directed by the order was proceeded with, but by a deed dated the 13th day of May, 1911, Michael Begley, as personal representative of Stephen Begley, deceased, and also as beneficial owner, purported to assign to Peter Begley all his estate and interest, whether as administrator or as beneficial owner, or otherwise, in the lands, stock, crops, chattels, and effects; and Rose Begley and Peter Begley purported to covenant with Michael Begley that they would execute a mortgage to secure to Michael Begley the sum of £300. This deed recited that Michael Begley claimed that the hereditaments and premises thereafter assured formed part of the assets of Stephen Begley, but that the defendant Peter Begley did not admit the claim; and it was further recited, *inter alia*, that it had been agreed between Michael Begley, Rose Begley, and Peter Begley that all further proceedings on foot of the originating summons and order should be stayed on the terms that £450, which included the sum of £300, should be paid or secured to Michael Begley, and that Michael Begley should

assign to Peter Begley all his estate and interest in the farm, and in the stock, crop, chattels, and effects thereon, and that the sum of £450 should be paid or secured by the then payment of £100 to Michael, and the sum of £50 to be paid before the 15th May, 1911, and the sum of £300 secured by a mortgage on the lands to be executed by Rose Begley, widow, and Peter Begley. It is alleged in the statement of claim that this sum of £450 represented the balance of Michael Begley's share of the farm and of the policy moneys, estimated by Michael as mentioned in his affidavit, and by an indenture of mortgage of the 15th May, 1911, Rose Begley and Peter Begley covenanted with Michael Begley to pay to him the sum of £300, and charged the lands with the payment thereof. On the 4th October, 1911, an application was made by Rose Begley to the Land Registry to discharge the equities by affidavit on the grounds specified in an application which was verified by her. I have read the application of Rose Begley and her affidavit verifying it. The application contains misstatements of the gravest kind. Rose Begley has, as I have said, verified this application by her affidavit sworn on the 22nd September, 1911, in which she swears that she had read the application, and believes the same to be true in all particulars. It is false in all material particulars, as she very well knew. It is quite apparent that the official before whom the application came did not act upon the statements in the application, but upon the perusal of the indenture of the 13th May, 1911, which is not referred to in Rose Begley's statement or affidavit, and, seeing that the personal representative had conveyed the lands to Peter Begley, registered the title of Peter Begley discharged from equities.

The statement of claim avers that by deed dated 2nd September, 1913, and made between Rose Begley of the one part and Peter Begley of the other part, in consideration of natural love and affection, Rose Begley, widow, assigned to Peter Begley all her estate in the lands and in the stock, crops, chattels, and effects of Stephen Begley remaining and unadministered, and all other stock, crops, chattels, and effects in and upon the lands, but charged with the payment to Peter on the death of Rose Begley of all debts due by her at the time of her death, and also her funeral expenses; that from the date of the death of the plaintiff's

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father to the 28th April, 1918, the date of the death of her mother, her mother, Rose Begley, was the guardian and bailiff of all her children, including the plaintiff, and that from the year 1883, when Michael Begley attained age, up to the 13th May, 1911, the date of the deed referred to, he was the bailiff of his brothers and sisters, including the plaintiff, who were infants under age at that date; that from the 6th of October, 1885, the date when the defendant, Peter Begley, came of age, he was and ever since had been the bailiff of his sisters, including the plaintiff, and that he had on the 13th May, 1913, express notice that Rose Begley was such guardian and bailiff, and took the assignment of that date with such express notice, and thereby became the bailiff of the plaintiff in the place of the said Rose Begley and Michael Begley, and that his possession as such bailiff has never been determined; that Rose Begley, widow, was not only the guardian of the plaintiff and of the other children, but also their then bailiff and trustee, and that Michael Begley and Peter Begley, the defendants, constituted themselves the bailiffs and trustees of the plaintiff and of the other children of the deceased, and not only well knew that Rose Begley, the widow, had been appointed guardian, but also knew that she had never carried out the duties of that office by paying or seeing to the payment of the children, and knew that they never had in fact been paid by the personal representative of Stephen Begley or otherwise.

The defendant, Peter Begley, in his defence denied that the sum of £400, alleged to have been paid to Michael Begley in 1901, was paid on account of his share of the assets of his father; he says that this sum of £400 was money lent by Rose Begley to Michael Begley, for which she took a mortgage of property of the defendant Michael Begley, dated 26th February, 1901. I can see no foundation for this statement. He also avers that from and after the 2nd September, 1913, he was in possession of the lands, and worked the same for his own sole benefit; that prior to and at the date of the issue of the originating summons mentioned and of the order made thereon of the 14th November, 1910, the claims of the plaintiff, in so far as they had not already been satisfied, and of all the next-of-kin, other than the parties named in the originating summons, to their respective shares of the

personal estate of Stephen Begley, deceased, and in particular to their shares of the lands, had become and were statute-barred, and that the only persons then interested in the lands were Rose Begley and the defendants, Michael Begley and Peter Begley, and that the agreement embodied in the deed of the 13th May, 1911, was entered into on that basis, and that the sum of £450 did not represent the balance of Michael Begley's share of the farm and the policy moneys.

The plaintiff in her evidence said that she was born in 1869; that her father died in 1876; that she was about six years of age when he died; she gave particulars of the names and ages of the other children, as to which there is no dispute; she said that she was married in September, 1898.

Elizabeth M'Guinness, a sister of the plaintiff, who is older than the plaintiff, says that she got £40 or £45 only five or six years before she married; she got no other payment; that she got this payment from Arthur McDonald's wife, who explained to her that she got it under her father's will. She married in 1894. She says that the morning she was married she got £30 or £36; she said that she always understood that there was a will, and that she knew there was a deal going on—which I take to have referred to the deal between her mother and Michael and Peter.

Michael Begley, one of the defendants, was examined for the plaintiff, and said that he was about thirteen years of age when his father died; that he remained on the farm until 1901, when he got married; that he knew his father had made a will, and that Mr. McDonald, one of the executors, had said that they should settle. He said that he got £150 when he left the farm in 1901; that he took proceedings on the 10th October, 1910; that Peter was then married; that he took a £300 mortgage and £150 in cash, and that in all he got £600. He says he then assigned his title all up. He says he brought the proceedings in 1910 on his own behalf.

FitzGibbon K.C., Williamson K.C., and P. O'C. White, for the plaintiff:—

Rose Begley was in occupation and possession of the lands till her death in 1918. As regards the plaintiff's interest, Rose

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Begley went into occupation and possession as her bailiff, and remained such bailiff until her death. Michael Begley and Peter Begley knew the plaintiff's rights, and they also were bailiffs of the plaintiff's interest. *In re Maguire and M'Clelland's Contract* (1) is distinguishable on two grounds: (a) it was decided on a vendor and purchaser summons, and the next-of-kin were not bound; (b) it was decided on presumptions of fact. The facts which were presumed to exist in that case do not exist in this case. If Peter Begley were selling the lands now, he could not make a statutory declaration such as that made by the vendor in *In re Maguire and M'Clelland's Contract* (1).

[They referred to *Thomas v. Thomas* (2); *Quinton v. Firth* (3); *Wall v. Standwich* (4); *Hoey v. Hoey* (5); *M'Mahon v. Hastings* (6); *Hobbs v. Wade* (7).]

S. L. Brown K.C., H. Wilson K.C., and Lardner, for the defendant Peter Begley :—

The plaintiff's right is statute-barred. Rose Begley, Michael Begley, and Peter Begley ceased to be bailiffs of her interest when she married and left the lands in 1898: *In re Maguire and M'Clelland's Contract* (1).

POWELL J. :—

[His Lordship, having stated the facts as above, proceeded as follows :—]

The defendant was not examined, nor was any witness examined on his behalf. The plaintiff was not cross-examined. I accept her evidence as being true, whatever the effect of it may be. There was admittedly no demand made by the plaintiff until this action was brought on the 6th September, 1918.

Mr. Brown, for the defendant Peter Begley, relies upon the decision of the Court of Appeal in *In re Maguire and M'Clelland's Contract* (1). It is necessary carefully to consider the facts of that case in order to ascertain whether the decision is one that

(1) [1907] 1 I. R. 393.

(2) 2 K. & J. 79.

(3) I. R. 2 Eq. 396.

(4) 34 Ch. D. 763.

(5) 31 I. L. T. R. 11.

(6) [1913] 1 I. R. 395.

(7) 36 Ch. D. 553.

is binding on me, having regard to the facts in the present case. It was an appeal from an order of the Master of the Rolls, Sir A. M. Porter, made on the 19th April, 1907, whereby, on the hearing of a summons under the Vendor and Purchaser Act, it was declared that the objections of the purchaser to the title had not been sufficiently answered, and that a good title to the lands sold had not been made.

[His Lordship dealt with the facts in that case, and proceeded:—]

The Master of the Rolls held that the title was not one which the Court would force upon a purchaser, and dismissed the summons, and ordered the deposit to be returned. The vendor appealed. In the Court of Appeal Sir Samuel Walker C. in his judgment said that the requisition of the purchaser that the interests of the children should be accounted for was, *prima facie*, a reasonable one, but he rejected the argument of counsel for the purchaser, which the Lord Chancellor said amounted to this, that no title could be made, even after the lapse of fifty years or more, under the Statute of Limitations, if the children were minors at the date of their father's death. He said there was no case that so decides; that the cases show that the relationship of principal and agent will be dissolved by circumstances; that the attaining of twenty-one years of age by the children is not enough in itself to dissolve the relationship, provided there is no break, but that in the case before him the children had left the place a long time previously; no claim had ever been put forward by any of them; and that he was of opinion that those facts constituted a sufficient break in the possession to dissolve the relationship of principal and agent, or guardian and ward. He referred to the case of *Wall v. Stanwick* (1), in which Mr. Justice Kekewich had said: "My view, however, is that she, the mother, is accountable as bailiff, and will continue to be so accountable until the relationship of principal and agent has been dissolved. How that can be done I do not for the moment consider." The Lord Chancellor continued: "Unless that relationship can be dissolved by a child going away, and remaining away for many years, without ever putting forward any claim, I do not see under what circumstances it could be taken to be dissolved, or how any title could ever be made under

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the Statute of Limitations in cases of this sort." He says the same principle is to be found in *In re Hobbs* (1), where Mr. Justice North said: "The cases which have been cited show that as he, that is, the father, was in possession as John's bailiff at the time when John attained twenty-one, he must be taken to have continued in possession in the same character unless something was done to change the character of his possession"; and the Lord Chancellor said: "What more important change could there be than the going away of children, abandoning the farm, and leaving their step-father in possession?" He said that the Court could not affirm the order of the Master of the Rolls, but that they would take down an undertaking of the vendor to give a statutory declaration that no claim had been made by any of the children at any time since they left the farm, and that, subject to that, they would declare that a good title had been shown.

The principle upon which this decision was arrived at was more fully explained by Lord Justice FitzGibbon. He said that the contention of purchaser's counsel, if adopted, would prevent specific performance of any agreement for the sale of land where a question of fact fit to be submitted to a jury arose in respect of any possible claimant abroad. He said that the Court, in his opinion, must investigate such questions, putting itself in the place of a jury, and if it finds that the Judge could tell the jury that if they believed the evidence they ought to find against the claim, the Court ought to hold the title to be sufficiently shown. He said that the vendor had insisted on making title through Thomas Maguire, but that the moment the purchaser ascertained that the farm originally was not Maguire's, that Cosgrave had been the tenant, and that Maguire came in by marrying Cosgrave's widow, who had children by her first husband, four of whom were minors at the date of their father's death, this rendered Thomas Maguire in equity a bailiff for these minor children, and the purchaser was right in insisting that their interests should be accounted for. He then states shortly the facts. He says that the four children, for whom the mother was bailiff when she married Maguire, against whom he or she were doing what they had no right to do when they got the

(1) 36 Ch. D. 553.

second husband's name inserted as tenant in the landlord's books, disappeared altogether from the farm. When each child left he or she had at least arrived at years of discretion; they all knew that the farm had been their father's; that their mother was still living on it, and that she had married their step-father, and that he had taken their father's place as tenant. Can I, he says, as a juror, have any doubt that when Catherine went into a convent in 1882, provision being presumably made for her, she finally left her mother's house, making no claim against the land? He then says, "When I am asked where is the break in the possession, I answer that it is to be inferred from the break in the title evidenced by the fact that the step-father was never interfered with, though he became the tenant from 1869 to the present time. I would tell a jury in an ejectment that as each son of the former tenant left the place without making any claim, he supplied some evidence that he had no claim, and that when many years had passed, and the statutory period had expired, and still no claim was made, it ought to be presumed that the former tenant's interest was extinguished under the Statute of Limitations."

If this decision means that in every case, and in all circumstances, in which next-of-kin children of a tenant, being of age, leave the family homestead without making a claim, and continue to remain away from the homestead for more than twelve years from the date of their leaving it, their interest is extinguished under the Statute of Limitations, this case appears to me to be an absolute authority for the defendant, and I should be obliged so to hold. But I do not think the Court of Appeal intended to lay down any such general proposition. They investigated questions of fact, putting themselves in the place of a jury. They were dealing with a case in which the following significant facts were present. No claim had ever been made by any of the children, these children knowing that the farm had been their father's, and knowing that their mother had married Maguire, and that he (Maguire) had assumed their father's place as tenant; and, knowing that, they had disappeared altogether from the farm. There was the fact that Maguire was never interfered with from the time at which he became tenant in 1869 down to and including the date in 1907 when the case was under

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Powell J. consideration. As put by the Lord Chancellor, they had the fact
 1920. that the children abandoned the farm, leaving their step-father in
RICE possession, and from these facts they presumed that the former
v. tenant's interest was extinguished under the Statute of Limitations,
BEGLEY. and that the beneficial interest had been acquired by Maguire. There was no evidence as to the circumstances in which the children left, or as to what, if any, share they might have received, and Lord Justice FitzGibbon apparently assumed that provision had been made for the last child, Catherine, when she entered the convent.

Now, I think that the facts in the present case are very different. The plaintiff, whose evidence I believe, was only six years of age when her father died. She has sworn—and, if it were untrue, I take it that witnesses could have been examined to disprove it—that she had never even heard any talk about her father's will, that she did not know that she was entitled to any share, and that that was the reason why she had never made any claim on her mother. She says that her mother, as far as she knew, managed the farm while she was there, and until her marriage in 1898 there was no break or change as far as she knew in her mother's occupation of the farm, and her mother herself has sworn in the affidavit to which I have referred that she was in beneficial occupation of the land from the death of her husband down to October, 1911, ignoring altogether the existence of her children, of whom she was guardian. The plaintiff's evidence amounted to this, that she did not know what her rights were, or that she had any rights, or that she was entitled to anything except what she might receive at the hands of her mother. She says she did not know of the transactions between her brothers Michael and Peter, which, if she had known, might have put her upon inquiry. How can I presume from her evidence that she had no claim, or that she had abandoned or released her claim? It is admitted that she received no part of her share of the interest in the farm, and the position of affairs on the evidence is that Michael got £450 as a result of his proceedings in this Court, and Peter gets a farm at present worth £5,000 and in 1911 worth £2,000 as a result of a deal with his mother and his brother Michael, both of whom admittedly had been, and, as I think, were at the time bailiffs for the plaintiff.

The onus is upon the person alleging the change in the character of the possession relied upon. This is made quite plain, I think, by the decision of Mr. Justice Romer in *Tinker v. Rodwell* (1), which I do not think is inconsistent with the decision of the Court of Appeal in *Maguire's Contract* (2). It will be observed that in that case a very long period had elapsed after the plaintiff had attained twenty-one and after he knew his position, during which the father held possession, and he did not take proceedings to assert his claim for nearly seven years after his father's death; and Mr. Justice Romer on this point says:—"Now, can I hold that in the present case there was a change in the character of the possession? I think not. At first I thought, having regard to the long period during which the father held possession after the plaintiff attained twenty-one and after the plaintiff knew his position, and having regard to the fact that the plaintiff did not take proceedings to assert his claim for nearly seven years after his father's death, that I should be justified in holding as a fact that some change took place in the character of the father's possession at a period anterior to twelve years before this action was brought. But on further consideration I have reluctantly come to the conclusion that I am not justified in so holding. It would be too dangerous to infer a change merely from the circumstances stated above. The onus of proving a change lies on the defendant, and that onus has not been discharged. I cannot lay hold of any circumstance which would enable me to fix a date for any such change. There is no evidence of any act on the part of the plaintiff or of the father which can be relied on as establishing or showing clearly any change."

I think the present case is a fortiori, because the plaintiff in this action did not know her position until the death of her mother, and she brought this action within a few months of her mother's death. I cannot lay hold of any circumstance in this case which would enable me to fix the date for any such change in the character of the possession of her mother or her brothers, who were admittedly respectively her bailiffs. There is no evidence before me of any act on the part of the plaintiff or of any act on the part of her mother or brothers of which she was

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(1) 69 L. T. 592.

(2) [1907] 1 I. R. 393.

Powell J. aware, which can in my opinion be relied on as establishing or
1920. showing clearly any change; and therefore, while not disputing
RICE the authority of the case referred to, I am not satisfied on the
v. facts of this case that there was any change; and in these
BEGLEY. circumstances I must make a decree for administration.

Solicitors for the plaintiff: *O'Hare & O'Hagan.*

Solicitors for the defendant Peter Begley: *Ward & Hamill.*

M. G. E.

McDERMOTT'S ESTATE.

Ross J.

1920.

July 2,

*Renewable lease—Lease for lives—Lives dropped—Equitable right to renewal—
Interest on fines—Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.).*

No renewal had been taken out for close on a hundred years in respect of a renewable lease, the last life in which had dropped thirty-two years ago. In view of the provision of the Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.), empowering "adequate compensation" to be awarded to a lessor in such a case, the Court, in the exercise of its judicial discretion, refused to allow the total arrears of interest on renewal fines, and allowed only six years' arrears in respect of each renewal fine.

QUESTION arising on Final Schedule of Incumbrances.

By a lease for lives renewable for ever dated July, 1707, certain lands in County Mayo were demised by Arthur Shean to James Wallace at a rent of £10 a year, with 10s. receiver's fees, and a fine of £10 for renewal on the fall of each life. Subsequently the lessor's interest was divided into two moieties, with separate renewals as to each, one moiety being vested in Mr. Shean Carter, the other in Miss Violet Knox. The lessee's interest became vested in Joseph G. McDermott, the vendor. The last renewal in respect of Mr. Shean Carter's moiety was made in 1822, and the cestuis que vie therein named died, or were presumed to have died, sixty-nine, forty-three, and thirty-two years ago respectively. The head-rent of £5, and all future fines, payable out of this moiety had been redeemed for a sum of £96 odd. It was admitted that a sum of £105 was owing for fines accrued due; and the total amount of interest on such fines to date of allocation came to £107 12s. 7½d. No renewal or fee-farm grant was ever taken out, nor fines paid or demanded up to 1917. The vendor objected that Mr. Shean Carter was not entitled to interest on the fines for the full period.

Herbert Wilson K.C., for the vendor:—

There is no statutory provision as to the amount of interest recoverable; the Statutes of Limitations do not apply. But the Court has a discretion in the matter, having regard to the Tenantry

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In re McDermott's
ESTATE.

Act (19 & 20 Geo. 3, c. 30 (Ir.)), and is only bound to give "adequate compensation": see Lyne on Leases, pp. 201, 273; Meecredy on Fee-farm Grants, p. 58. It is not equitable to demand the entire arrears. The lessor is entitled to adequate compensation; nothing more. There appears to be no direct authority on the point.

Macrory, for Mr. Shean Carter :—

There is no authority, because the universal practice of allowing arrears in full has never been questioned. Full interest has always been given.

[Ross J.: Surely it is not equitable to pile up such a large sum on a £5 rent?]

It is not equitable to fail to pay money when due, and then to escape interest on the debt. The lessee has forfeited his right to a renewal; but equity allows him to redeem that right by paying interest. He can only get the advantage of the covenant by doing equity.

[Ross J.: "Adequate compensation" in the Tenantry must mean an amount to be fixed by the Court. If the statute meant by the phrase full arrears of interest, why was it not so expressed?]

Mere lapse of time gives the lessee no right. This is not the case of a debt, which it might be argued the lessor should have demanded. He did not want it. He was content to receive the rent from the lessee as a yearly tenant. And now the lessee, after the lapse of many years, comes in and asks for the benefit of his covenant. [He referred to Carleton's County Court Practice (ed. 1878), p. 625, *In re Coates* (1), and to sect. 1 of the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105).]

Ross J. :—

There appears to be no direct authority on the question submitted to me. I must therefore deal with it on first principles. As theoretically there is a forfeiture when the lives drop, the unpaid fines must carry interest. We have here an old lease for lives, dating from 1707, containing the usual covenant

for perpetual renewal. Various renewals were made from time to time up to the year 1822, but none since. The lessor's interest in the lands became divided into two moieties, £5 annual rent being payable in respect of each. One of these rents has been redeemed at £96 odd, but the arrears of interest in respect of renewal fines amount to upwards of £107, calculated on the basis of the number of years elapsed since the three lives fell in—viz., 69, 43, and 32 years respectively. There is no evidence that the fines were ever demanded until the year 1917. To allow so much appears unreasonable. Mr. Macrory argues that in law the lessee's estate is gone once the period of grace has expired. But the covenant for renewal remains, giving the lessee an equitable right to renewal. There is one consideration which throws a little light on the problem—the language used in the Tenantry Act, which directs the Court, in the circumstances mentioned in the section, to give “adequate compensation.” If the Court was to give full interest in every case, the statute would probably have so provided. I will not, unless I am coerced, be a party to allowing the full sum demanded for interest—viz., £107 12s. 7½d. I think I can do substantial justice by following the analogy of the Statutes of Limitations, and allowing six years' arrears of interest in respect of each renewal fine.

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Solicitors for the vendor: *Gore & Grimes.*

Solicitors for Mr. Shean Carter: *Reeves & Son.*

T. C. T.

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1920.

June 16.

IN RE LEAHY.
LEAHY AND OTHERS v. PAYNE AND OTHERS.
(1920. No. 92.)

Appointment—Special power—Condition.

Although a condition fettering an appointment to an object of a special power is in general invalid, it may be valid if it operates in favour of another object of the power.

In re Witty ([1913] 2 Ch. 666) applied.

TRIAL OF ACTION.

Thomas John Leahy, being possessed of considerable freehold and leasehold property in Co. Cork, and also of personal estate, by his will, dated 7th June, 1873, devised and bequeathed all his property to his trustees and executors in trust for his grandnephew, Thomas Joseph Carroll, for life, and on his death, in the events that happened, to the use of the sons of Thomas Joseph Carroll successively in tail male; and authorized Thomas Joseph Carroll, on attaining 30 years of age, to charge the estates in favour of younger children with £1,500 if he should have only one younger child, and £3,000 if more than one, with power to appoint said sums by deed or will among such younger children. The testator died on 26th September, 1881, and probate of his will was granted on 10th November, 1881.

Thomas Joseph Carroll, having assumed the name of Leahy and attained the age of 30 years, executed a marriage settlement, dated 3rd January, 1888, whereby, in exercise of the power contained in the will of Thomas John Leahy, he charged the settled lands and hereditaments with the sum of £1,500 in case there should be only one younger child issue of the marriage, or with £3,000 if there should be more than one younger child, and in further exercise of the power limited and appointed the lands and hereditaments to the trustees of the settlement for 1,000 years from the settlor's death on trust by sale or mortgage to raise either of the said sums, as the case might be. By his will, dated 9th August, 1913, Thomas Joseph Leahy, in exercise of a power contained in the will, dated 14th July, 1884, of his mother, appointed the sum of £21,000 (subsequently altered by a codicil

to £15,000) to his three sons—John Leahy, Edward Leahy, and Henry Leahy—who should attain the age of 21, in equal shares, and appointed the residue of the trust funds in the said will to his eldest son absolutely. He further gave to his trustees the sum of £15,000 in trust for such one or more of his daughters—Olive Leahy, Ida Mary Leahy, and Philippa Leahy—who should attain the age of 21 years or marry, in equal shares, the share of each to be held in trust for her during her life and on her death for her issue as therein set out, provided that, on the failure of the trusts declared concerning the share of any daughter, such share should accrue to the shares of the others, and be subject to the like trusts. The testator then recited his power of appointment over the charge of £3,000 under Thomas John Leahy's will, but declared that, inasmuch as he had in his lifetime paid or by his will had appointed or bequeathed to each of his younger children more than the shares of the sum of £3,000 to which they would be entitled under the will of Thomas John Leahy and testator's marriage settlement, the dispositions in his will should take effect according to the doctrine of election, so as to be binding on all his younger children, and should be accepted by them in substitution for any shares in the sum of £3,000, and that thereupon the said charge of £3,000 should cease and determine, and should go according to the trusts of the will of Thomas John Leahy then subsisting and capable of taking effect; and the testator appointed his wife Annie Mary Leahy, his son Thomas Joseph Leahy, and Edward Emerson his trustees and executors. The testator died on 5th May, 1919, and probate of his will was granted to Annie Mary Leahy and Edward Emerson. Thomas Joseph Leahy left eight children him surviving:—Thomas Joseph Carroll Leahy, his eldest son, and seven younger children, viz., John Harold Carroll Leahy, Mary Ida Carroll Leahy, Kathleen Mary Leahy, Olive Gladys Leahy (all of whom attained the age of twenty-one years before action brought), and Ida Mary Leahy, Philippa Leahy, and Henry Leahy, infants under the age of twenty-one. Another son, Edward Leahy, predeceased the testator, under age, and unmarried. Thomas Joseph Leahy not having exercised his power of appointment in respect of the sum of £3,000, the seven younger children, in the events that had happened, became entitled thereto equally. The lands

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Ross J. and estates, subject to the trusts of Thomas John Leahy's will
 1920. (except an inappropriate tithe rentcharge), had been sold or
 LEAHY redeemed in various proceedings, and were at the date of the
 v. action represented by certain securities standing in the names of
 PAYNE. the plaintiffs in the action, Annie Mary Leahy and Edward
 Emerson, trustees and executors of the will of Thomas Joseph
 Leahy. The defendants, Philip Harold Barry and Harold
 Harold Barry, were sued as trustees of the will of Thomas John
 Leahy and of the marriage settlement of 3rd January, 1888 (the
 other trustee, Somers Payne, having previously died). The defen-
 dants Ida Mary Leahy, Philippa Leahy, and Henry Leahy, the
 infant children of Thomas Joseph Leahy, appeared by Mary Ida
 Carroll Leahy, their guardian ad litem. The defendant Thomas
 Joseph Carroll Leahy was the eldest son of Thomas Joseph
 Leahy. The plaintiffs asked for an order that the defendants
 Ida Mary Leahy, Philippa Leahy, and Henry Leahy should elect
 between the benefits conferred on them by the will of Thomas
 Joseph Leahy and those arising under the will of Thomas John
 Leahy of 7th June, 1873, and the Deed of Settlement of
 3rd January, 1888. The facts and documents above set out
 were admitted.

Norwood K.C. (with him *Hungerford*), for the plaintiffs.

J. M. FitzGerald, for the defendants Philip Harold Barry and
 Harold Harold Barry.

Longfield, for the three infant children of Thomas Joseph
 Leahy :—

It is admitted that Ida and Philippa Leahy are bound to
 elect. As regards Henry Leahy, the doctrine of election does not
 apply, as the testator gave him no free and disposable property
 which the Court could take hold of to compensate the eldest son :
Bristow v. Warde (1).

[*Herbert Wilson* intimated that he intended to argue that the
 appointment of part of the £15,000 fund to Henry Leahy was a
 conditional appointment, and that he could take no share of the
 fund unless he fulfilled the condition.]

The testator actually stated in his will that the appointment
 was to operate by virtue of the doctrine of election. As regards

the question of a conditional appointment, there are three classes of cases: first, the condition may be bad and the appointment good if severable from the condition: *In re Holland, Holland v. Clapton* (1); secondly, the condition may render the whole appointment void if it cannot be separated; and thirdly, there is a class of cases in which there is a conditional limitation: *Stroud v. Norman* (2). 'In the present case there is no alternative destination for the property; it is not a case of a conditional limitation, but a case of a simple condition attached to an appointment which should be rejected.

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Herbert Wilson K.C. (with him *H. Vaughan Wilson*), for the defendant *Thomas Joseph Carroll Leahy* :—

This is a case of a conditional appointment, and the condition is good because it is for the benefit of an object of the power: *In re Whitty* (3).

Ross J. :—

As far as *Ida and Philippa* are concerned, this is a clear case of election. As regards *Henry*, the proposition to be decided in this case is not whether there is or is not free and disposable property of the testator which can be sequestrated by the Court for the purpose of compensating a disappointed object of a power whose share has been given by the testator to a non-object of the power. The question I have to decide is whether the exercise of a power by the appointment in this case of a share of the fund to an object thereof subject to a condition is good or bad. In my opinion, the law is clear that the appointment is good, provided the condition is to operate in favour of another object of the power: *In re Witty* (3), following *Sadler v. Pratt* (4); see *Farwell on Powers*, 3rd ed., p. 344. I accordingly hold that *Henry Leahy* is bound to elect whether he will take under the will of *Thomas Joseph Leahy* or under the will of *Thomas John Leahy*, dated 7th June, 1873, and the marriage settlement of 3rd Jan., 1888.

Solicitors for the plaintiffs: *Foley & Emerson*.

Solicitors for the defendants *P. H. Barry, H. H. Barry, Ida M. Leahy, P. Leahy, and H. Leahy*: *Thomas Exham & Sons*.

Solicitor for the defendant *Thomas J. C. Leahy*: *Ivan Howe*.

T. C. T.

(1) [1914] 2 Ch. 595.

(2) *Kay*, 313.

(3) [1913] 2 Ch. 666.

(4) 5 Sim. 632.

Powell J.
1920.

M'CORD v. RAMSEY.

July 1.

*Vendor and Purchaser—Agreement for sub-lease to the purchaser—
Preparation of sub-lease.*

A in consideration of a sum of £375, and the yearly rent of £3 10s. to be paid to A by B, agreed to grant to B a sub-lease of premises for 9000 years, the "sale" to be completed and possession given, and rent to commence on the 1st June following the date of the agreement.

Held, that the agreement was one for a sub-lease, and that the lessor's solicitor was entitled to prepare it.

VENDOR AND PURCHASER'S SUMMONS.

By agreement dated 21st day of May, 1920, in consideration of the sum of £375 to be paid by Edward M'Cord to Mary Ramsey, and of the yearly rent of £3 10s. to be paid half-yearly, Mary Ramsey agreed to grant and the said Edward M'Cord to take from her a sub-lease for 9000 years, from 1st June, 1920, of the dwelling-house known as No. 61 Ogilvie Street, in the City of Belfast; "the sale to be completed on the 1st day of June, when possession of the premises shall be given. A deposit of £50 to be paid to Messrs. E. & L. Kennedy, solicitors, on the signing hereof."

The vendor's solicitors claimed to be entitled to prepare the sub-lease on behalf of the vendor at the purchaser's expense. The purchaser contended that he was entitled as purchaser of the house to have the sub-lease prepared by his own solicitor, and brought the present summons for a declaration to that effect; in the alternative the purchaser claimed to have the sub-lease prepared by the respective solicitors of the vendor and purchaser at their joint expense.

M'Cutcheon, for the purchaser:—

The transaction was a purchase of premises. The conveyance, though in the form of a sub-lease, should be prepared by the purchaser at his own expense. In a similar case the Council of the Incorporated Law Society decided that the transaction was a

3.

purchase, and that the purchaser's solicitor should draw the necessary deed, each party paying his own solicitor's costs: *Law Calendar for 1920, Decision No. 17, p. 427.*

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M^CGonigal K.C., for the vendor:—

This is a lease transaction. The vendor is entitled to draw the sub-lease at the purchaser's expense. The purchaser bought a long sub-lease at a fine; therefore the schedule to the Solicitors' Remuneration Act, 1881, applies. The Incorporated Law Society's decision is wrong: Henry, *Solicitors' Remuneration*, pp. 147, 174, 176, 178, and 184. There is no case in the Reports covering the point, but in several similar cases it was assumed that the lessor's solicitor should draw the lease: *Ex parte Connolly* (1); *In re Meceddy* (2); *In re Robson* (3); *In re Horne* (4).

M^CCutcheon, in reply:—

The agreement on its face refers to the transaction as a "sale." The ultimate manner of carrying out the sale does not alter the fact that it was a sale to be carried out by a sub-lease.

POWELL J.:—

I cannot bring myself to decide that this is anything but a lease. [His Lordship read the agreement dated 21st May, 1920.] Whatever the transaction was intended to be at the beginning, this document is an agreement for a sub-lease. I do not think that the use of the word "sale" can cut down the operative words that a sub-lease was to be granted. Therefore the lessor's solicitor is entitled to prepare the sub-lease. In the circumstances each party must pay his own costs of the summons.

Solicitors for the vendor: *E. & L. Kennedy.*

Solicitor for the purchaser: *George Martin.*

D. M. S.

(1) [1900] 1 I. R. 1.

(3) 45 Ch. D. 71.

(2) [1920] 1 I. R. 93.

(4) [1896] 2 Ch. 797.

Powell J.
1920.

CONGESTED DISTRICTS BOARD v. ATTORNEY- GENERAL.

June 16.
July 23.

(1919. No. 1035.)

*Land purchase—Congested Districts Board—Expenditure on improvements—
Sale to tenants at enhanced price—Recoupment in money or in Land
Stock—Irish Land Act, 1903 (3 Edw. 7, c. 37), sect. 72, sub-s. 3—
Irish Land Act, 1909 (9 Edw. 7, c. 42), sect. 3.*

Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that when the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission for repayment to the Congested Districts Board such sums as represent the increase of price consequent on the improvements.

Held, that the Congested Districts Board are entitled to receive such advances in money, and not in land stock, notwithstanding anything contained in sect. 3 of the Land Act, 1909, which provides that advances for the purpose of the Land Purchase Acts may be made in whole or in part by means of stock.

TRIAL OF ACTION.

The plaintiffs sought a declaration that they were entitled to repayment by means of money of such sums as from time to time became payable to them under the provisions of sect. 72, sub-s. 3, of the Irish Land Act, 1903, in cases where they had expended money on the improvement of an estate, and in consequence had sold parcels of the estate at an enhanced price to tenants and others, and had become entitled to repayment as provided by the section of such sums as represented the increase of price consequent on the improvements.

The plaintiffs in their statement of claim averred that they had been established and incorporated for the execution and performance of the several statutory objects, powers, and duties set out in the Congested Districts Board Acts, 1891 to 1909, and that they had power to purchase land under the provisions of the Irish Land Purchase Acts for the re-sale thereof to tenants and other

persons. The statement of claim set out the provisions of sect. 72, sub-s. 1, of the Irish Land Act of 1903, and of sect. 72, sub-s. 3, and averred that in pursuance of their obligation under sect. 72, sub-s. 3, of the Irish Land Act, 1903, and of the powers conferred upon them by sect. 41 of that Act, and of sect. 14 of the Land Act of 1909, the Lords Commissioners of His Majesty's Treasury had made certain rules and regulations dated 24th January, 1912, of which rules 26, 27, and 28 referred to the plaintiffs.

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The statement of claim further averred that on the 13th February, 1913, by an offer, in writing, made to the Land Judge in the matter of the estate of N. O. Scott, an infant, and of Amy Frances Scott, widow, owners, and Matthew Scott, petitioner, the plaintiffs, in exercise of their statutory powers in that behalf, offered to purchase in fee-simple the lands of Kilagh, in the Barony of Moycullen and County of Galway, containing 600 acres, 1 rood, and 28 perches, at the price of £1024, to be provided and paid in 3 per cent. Guaranteed Stock in accordance with the Land Purchase Acts and the Congested Districts Board Acts, on the terms and conditions in the said offer appearing; and that on the 25th of June, 1913, by an order of the Land Judge made in the matter this offer of the plaintiffs was accepted, and that the lands were accordingly vested in the plaintiffs as purchasers in fee-simple on the 25th June, 1913. After the lands had been vested in the plaintiffs as owners, the plaintiffs caused certain improvements to be executed upon the said lands in the erection of mearing fences and buildings thereon, and expended on said improvements a sum of £77 12s. 7d. in actual money out of their income; after the execution of these improvements the plaintiffs re-sold the whole of the said lands in separate parcels or holdings to divers persons at the enhanced price of £1090, whereof the sum of £66 represented the increase of price consequent on the said improvements made by the plaintiffs over and above the price paid for the lands by the plaintiffs in the Land Judges' Court, and the plaintiffs contended that under and by virtue of the provisions of sect. 72, sub-s. 3, of the Irish Land Act, 1903, they were entitled to the repayment of the said sum of £66 in money. On the completion of the re-sale of the lands by the plaintiffs for this sum of £1090, the Irish Land Commission, acting in compliance with a

Powell J. letter from His Majesty's Treasury, dated 13th February, 1913,
 1920. transferred the sum of £66 Immature Guaranteed 3 per cent.
 C. D. B. Stock, 1939, in the books of the Bank of Ireland to the account
 v. of the plaintiffs, as being the repayment to the plaintiffs of the
 ATTORNEY- said sum of £66. The said sum of £66 Immature 3 per cent.
 GENERAL. Land Stock was, on the 7th March, 1918, the date of the paying
 order, equivalent to about £38 6s. 5d. in money. The plaintiffs
 refused to accept the transfer of this sum of £66 stock, and con-
 tended that under the provisions of sect. 72, sub-s. 3, of the Irish
 Land Act, 1903, they were entitled to be repaid the sum of £66 in
 money and not in stock. The Irish Land Commission refused to
 accept a re-transfer of the said sum of £66 stock, and refused to
 pay to the plaintiffs this sum of £66 in money in respect of the
 transaction, and stated that the Lords Commissioners of His
 Majesty's Treasury and the National Debt Commissioners refused
 to make any advance to the Irish Land Commission for the
 repayment to the plaintiffs of the sum of £66 otherwise than by
 means of the said amount of stock. The Lords Commissioners of
 His Majesty's Treasury contended that by virtue of the provisions
 of sect. 3 of the Irish Land Act, 1909, the repayment to be made
 to the plaintiffs pursuant to sect. 72, sub-s. 3, of the Irish Land
 Act, 1903, may be made by means of stock to an amount equiva-
 lent in nominal value to the sums repayable to the plaintiffs under
 sect. 72, sub-s. 3, instead of by means of money.

The plaintiffs contended that the moneys advanced to the
 Land Commission for repayment to or recoupment of the
 plaintiffs, as provided by sect. 72, sub-s. 3, of the Irish Land Act
 of 1903, are not "advances for the purposes of the Land Purchase
 Acts" within the meaning of sect. 3 of the Irish Land Act of
 1909.

In the defence it was submitted that the agreement for the
 re-sale of the lands of Kilagh by the plaintiffs in separate parcels
 or holdings to divers persons, as set out in the statement of claim,
 were "future purchase agreements" within the definition of such
 contained in sect. 13 of the Irish Land Act, 1909; and, further,
 that the consideration received from the purchasers of the said
 parcels and holdings from the plaintiffs for the improvements
 made by the plaintiffs on the said lands was represented by the

additional annuities paid by the said purchasers to the Land Purchase Fund, and that the measure of the value of the said additional annuities was the market value of £66 Immature Guaranteed 3 per cent. Land Stock, which stock had been transferred in the books of the Bank of Ireland to the account of the plaintiffs by the Irish Land Commission in satisfaction of the plaintiffs' claim.

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It was admitted that after the lands in question had been vested in the plaintiffs as owners, they caused improvements to be executed on the lands, in the erection of mearing fences and buildings, and that they expended on these improvements the sum of £77 12s. 7d. in actual money out of their income; that after the execution of the improvements the plaintiffs re-sold the whole of the lands in separate parcels or holdings to divers persons at the enhanced price of £1090, whereof the sum of £66 represented the increase of price consequent on the improvements made by the plaintiffs over and above the price paid for the lands by the plaintiffs. .

S. L. Brown K.C., Leonard K.C., and J. M. FitzGerald, for the plaintiffs.

W. E. Wylie K.C., E. S. Murphy K.C., and H. O. Holmes, for the defendant.

POWELL J. [having stated the facts, as above, the learned Judge proceeded:—] July 23.

The Lords Commissioners of His Majesty's Treasury, in pursuance of their obligation under sect. 72, sub-s. 3, of the Irish Land Act, 1903, and of the powers conferred on them by sect. 1 of that Act, and by sect. 14 of the Irish Land Act, 1909, have made certain rules and regulations, dated 24th January, 1912. It appears that when lands are purchased by the Congested Districts Board and an advance made through the Land Commission by the Treasury, the amount is debited against the Congested Districts Board in the accounts. The advance never reaches the hands of the Congested Districts Board in the shape of either money or stock. The Congested Districts Board pay interest on the amount so advanced and debited at the rate of $2\frac{3}{4}$ per cent. for the period during which the lands remain on their hands; and if the lands

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remain on their hands for four years and upwards, they pay, in addition to the $2\frac{3}{4}$ per cent., 10s. per cent. contribution to the Sinking Fund under sect. 72, sub-s. 2. When the lands have been improved by the Congested Districts Board and are re-sold to the occupying tenants, it appears that the amount advanced to the occupying tenant for each parcel of land is credited to the account of the Congested Districts Board as against the debit of the whole price paid to the vendor. Of course, if no improvements are effected on the lands, then the amount of the advance to the purchasing tenants would exactly coincide with the amount advanced to the Congested Districts Board. Apparently, when the estate is vested in the Congested Districts Board, the amount of the advance is paid into the Bank of Ireland to the credit of the estate of the vendor. The money is allocated by the Land Commission, the superior interests are redeemed, and the Congested Districts Board for the time being are owners. In no event, apparently, can the Congested Districts Board make any profit on the transaction. When on the re-sale to the tenant-purchasers the amount of the Board's original debt is wiped out by its transfer to the tenant-purchasers, the financial transaction is apparently at an end so far as the Congested Districts Board is concerned.

It appears that the Congested Districts Board are provided by statute with an annual income of £231,000, and that out of this sum they are obliged to pay all their expenses and perform their statutory duties, amongst which is included the improvement of holdings. The expenditure by the Board of moneys for this purpose in many cases directly produces an additional value which enables the Board to claim and obtain from the purchasing tenants what is called an enhanced price, and in such cases, of course, the price at which the tenants have purchased exceeds the total price paid by the Board to the vendor; and provision is accordingly made that the Congested Districts Board should be recouped what they have spent in producing that result. Mr. Brown, on behalf of the plaintiffs, says—and it has not been disputed—that, taking one estate with another, the Board find that roughly one-half of its expenditure on the lands is productive of an enhanced price; that they spend roughly £200,000 a year on the improvement of lands, and that of that sum £100,000 is directly productive of an enhanced price;

that if the Board gets back this £100,000, it can go on spending the £200,000, because the deficiency of one year is met by the recoupment, so that they can keep on working at that rate. This right of recoupment is given by sect. 72, sub-s. 3, which is in the following terms:—"Regulations made by the Treasury may provide that where the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission, for repayment to the Congested Districts Board, such sums as represent the increase of price consequent on the improvements." So long as the Act of 1903 was the Act under which the advances were made, apparently a right of recoupment in money was given effect to without any question.

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It is, I think, important to refer to the right of recoupment of the Land Commission for moneys expended on improvements. This was provided for in the Act of 1903 by sect. 44, sub-s. 3, of that Act, the provisions of which are similar to those which apply to the Congested Districts Board in sect. 72, sub-s. 3. In referring to this right of recoupment to the Land Commission Mr. Justice Meredith, in *Warden's Estate* (1), said that sect. 43, sub-s. 3, was a section apart—a code in miniature—and held, as a matter of law, that the words "enhanced price" and "increase of price consequent on the improvements" relate to the enhanced price of parcels of land or the increased price of parcels of land consequent on the improvements. He points out that neither in the case of a non-congested estate or of a congested estate was there any difficulty in ascertaining what was the enhanced price; and that the National Debt Commissioners, in getting in the instalment annuities, were getting back the enhanced price paid by the tenants; and that the Legislature says that under such circumstances the National Debt Commissioners are to advance such sums as represent the increase of price.

Apparently the Congested Districts Board were recouped in money the sums that they so expended for improvements on land up to 1913, and, as far as I have been able to gather, the

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contention of the Treasury that the recoupment might be by means of stock was not raised until 1913 in regard to the recoupment claim by the Board on the re-sale of Scott's estate, as set out in pars. 5 and 6 of the statement of claim. The contention put forward by the Treasury is grounded on the provisions of sect. 3 of the Act of 1909, which, in its first sub-section, provided that, notwithstanding anything in sect. 27 of the Act of 1903, advances for the purposes of the Land Purchase Acts might, subject to the provisions of the section, be made in whole or in part by means of stock; and they say that the consideration received from the tenants for the improvement or other elements of increased value in the present case is represented by the additional annuities, the true value of which is measured by the market value of the corresponding amount of stock, and, therefore, that the Land Purchase Fund, which receives the annuities, should only pay the Congested Districts Board the value of those annuities, that is to say, the corresponding amount of stock; in other words, that the advances by the Land Commission by way of recoupment should be paid to the Board in stock. Sect. 27 of the Act of 1903 provided that in the case of agreements entered into after the passing of the Act, advances for the purposes of the Land Purchase Acts should be made by means of money, and not by means of Guaranteed Land Stock, and that sums required for this purpose were to be issued out of a special fund to be under the control of the National Debt Commissioners, and to be called the Irish Land Purchase Fund.

Mr. Brown contends that the only question in this case is whether the advance referred to in sect. 72, sub-s. 3, of the Act of 1903 is an advance for the purposes of the Land Purchase Acts within the meaning of sect. 3, sub-s. 1, of the Act of 1909. And he submits that it is not. Having regard to the methods provided for advances for land purchase in the Act of 1903, I think it is clear that sub-s. 3 of sect. 72 of the Act of 1903 was intended to provide for recoupment, that is, actual recoupment in money, and, therefore, one of the questions to be determined would be whether by reason of any provision in the Land Purchase Act of 1909 the statutory right of complete recoupment has been, by necessary implication, taken away, and made dependent as to the

extent of the recoupment upon the price of stock? There is certainly no express enactment to that effect in the Act of 1909.

Mr. Brown contends that sect. 72 of the Act of 1903 is not a section of a Land Purchase Act at all. Sects. 98 and 100 of the Act of 1903 define what are Land Purchase Acts and what are Congested Districts Board Acts. Sect. 100 declares that Part II of the Act of 1903 is to be construed as one with the Congested Districts Board Acts, and may be cited with those Acts. Therefore sect. 72 of the Act of 1903 is a section in a Congested Districts Board Act, and therefore the purposes for which the advance is made under sect. 72, sub-s. 3, is for the purposes of a Congested Districts Board Act; and I think that this view is strengthened, if not confirmed, by the fact that under the first sub-section of sect. 76 payments made under the sub-section are to be "deemed to be" advances made to the Land Commission for the purposes of the Land Purchase Acts, so that sums required by the Congested Districts Board for advances for the purchase of land are to be deemed to be—because otherwise they would not be—advances made to the Land Commission for the purposes of the Land Purchase Acts. But I think that advances to the Land Commission under sub-s. 3 of sect. 72 are not advances for the purchase of land so as to be deemed advances made to the Land Commission for the purposes of the Land Purchase Acts, but are for the special purposes of sub-s. 3, namely, repayment or recoupment to the Congested Districts Board of moneys expended by them on the improvement of an estate, by reason of which an enhanced or larger price is paid by the tenants than the amount advanced under sub-s. 1 for the purchase of the land.

Turning to sect. 3 of the Act of 1909, which is a section in Part I of the Act, Land Purchase Finance, we find that sub-sects. 3 and 4 are the sub-sections which make stock issued under that section compulsorily the equivalent of money, but only as between vendor and purchaser, and only in relation to the purchase-money. Sub-s. 4 of sect. 3 of the Act of 1909 is as follows:—"Stock issued in pursuance of this section as the equivalent of an advance shall, as between the vendor and the purchaser, be accepted by the vendor as the equivalent of the corresponding

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amount of purchase-money, and a vendor, although he is not an absolute owner, may agree to advances being made by stock under this section for the purpose of carrying out any pending purchase agreements; and any person having power to sell under the Land Purchase Acts, although he is not an absolute owner, may enter into any future purchase agreements notwithstanding that the purchase-money may be payable in stock in pursuance of this section instead of in cash."

Sect. 72, sub-s. 1, of the Act of 1903 is, of course, affected by these sub-sections, because payments made to the Congested Districts Board for advances for the purchase of land are deemed to be advances made for the Land Purchase Acts. But sect. 72, sub-s. 3, of the Act of 1903 does not create any relation of vendor and purchaser. It defines the right of the Congested Districts Board to get from another Department recoupment of moneys expended for improvements.

But the further question arises: does this sub-section, by necessary implication, alter the right of actual recoupment to the plaintiffs provided in sect. 72, sub-s. 3? It deals with advances or "the purposes of the Land Purchase Acts," which are the opening words of sect. 27 of the Act of 1903, and then provides for a return to the system of making advances for the purposes of the Land Purchase Acts by the issue of stock, which principle is to be found in sect. 1 of the Purchase of Land (Ireland) Act, 1891, and which system was altered by sect. 27 of the Irish Land Act of 1903, which restored the system of cash advances provided under the Land Acts of 1870, 1881, and 1885. But does the change effected by this system in regard to future purchase agreements and advances for the purposes of the Land Purchase Acts affect the rights of the Congested Districts Board under sub-s. 3 to obtain an advance, which I think is not for the purpose of the Purchase Acts within the meaning of the sub-section? In *Seward v. Vera Cruz* (1) Lord Selborne says (at p. 68): "Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed,

altered, or derogated from merely by force of such general words without any indication of a particular intention to do so." Now, I think we have in sect. 3 of the Act of 1909 words which apply to the financing of Land Purchase Acts in the future which are capable of reasonable and sensible application to their purpose without extending them to the subject specially dealt with by sect. 72, sub-s. 3, of the Act of 1903, namely, the recoupment of the Congested Districts Board.

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Mr. Wylie, on behalf of the Attorney-General, contended that the advance made under sect. 72, sub-s. 3, is an advance for the purpose of the Land Purchase Acts within the meaning of sect. 3, sub-s. 1, of the Act of 1909; but he does not rest his case solely on this contention. He says that the policy of the Legislature in the Act of 1909 is to be found by looking at the Land Commission sections of that Act. He says that before 1909 the Land Commission had power to make improvements, and that they were recouped in toto. He says it became obvious that this was a bad principle, and that sect. 30 of the Act of 1909 was passed. He says that this section shows the policy of the Act, which is that moneys expended are not to be found by the taxpayer. They are to be added to the purchase-money or the annuity, and he says that exactly the same policy applies to the Congested Districts Board under sect. 72. He says that the Board must make their bargain with the tenants in such a way that there is to be no loss—in such a way that the tenant is to repay the money that has been spent; that they are to get such a sum, or the equivalent of such a sum, as represents the enhanced price of the holding; and that, if they are not sufficiently astute to do this, they must bear the loss out of their income, which will render them more astute in the future.

As far as I can see, to carry out a transaction on these lines between the Congested Districts Board and the tenant-purchasers in the present case, the Congested Districts Board would have to say to the tenant-purchasers, "We have expended money on your holdings on improvements which have increased their value by £66; but if we add £66 only to your purchase-money, we shall only receive by way of repayment £66 stock, which is the equivalent of £38 cash. Therefore we must add to the purchase

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price of your holding, not £66, but such an amount as, measured by the value of stock, will produce £66, namely, about £114, which sum of £114 you, the tenants, will repay in due course in cash." I venture to suggest that, having regard to the class of tenant-purchasers with whom the Congested Districts Board have to deal, tenants for the most part in impoverished circumstances, bargains upon these lines would be very difficult to effect.

Undoubtedly the provisions of the Act of 1903 as to recoupment to the Land Commission were altered by sect. 30 of the Act of 1909, which is in Part II, containing the land purchase sections of the Act, and before you come to sect. 30 you find that by sect. 29, sub-s. 3, it is provided that sub-s. 3 of sect. 43 of the Act of 1903 shall cease to have effect, and then sect. 30 provides, as Mr. Wylie says, that where the Land Commission deem it expedient to expend money on the improvement of a holding, sold or agreed to be sold by a landlord to a tenant, they may enter into an agreement with the tenant for the repayment of the money so expended in the same manner as if such money was advanced under the Land Purchase Acts for the purchase of the holding, and the said money shall be repaid by an additional annuity, and then the Treasury may, under their regulations—which means "must," where the repayment of any money expended by the Land Commission is secured by additional annuity under the section—provide that the National Debt Commissioners may advance to the Land Commission the money, that is, the actual money, for repayment to the Reserve Fund, and if that fund has been exhausted, for repayment to the Exchequer. But this section is confined to moneys spent by the Land Commission on the improvement of a holding sold by a landlord to a tenant. Now, the sections of the Act of 1909 dealing with congested districts and affecting the Congested Districts Board are to be found in Part III of the Act, and there is no such section as section 30 to be found in this part of the Act, and unless one is to find the policy as regards the Land Commission clearly set out in sect. 30 applied to the Congested Districts Board by sect. 3 of the Act of 1909, it is not to be found at all, so far as I can see, in the Act; and for the reasons which I have stated I do not think that sect. 3 can have the effect of either repealing, altering, or derogating

from the right of recoupment conferred on the Congested Districts Board by sect. 72, sub-s. 3, of the Act of 1903. When the Legislature wished, as regards the Land Commission, to give effect to their new policy, they cleared the old policy of sub-s. 3 of s. 43 of the Act of 1903 out of their way by sect. 29, sub-s. 3, of the Act of 1909, and by expressly repealing that sub-section in the second schedule of the Act, but they have not so dealt with sect. 72, sub-s. 3, of the Act of 1903. Sections 44 to 60, Part III, of the Act, are by sect. 68 to be construed as one with the Congested Districts Board Acts, and none of these sections deals with the rights of the Congested Districts Board under sect. 72, sub-s. 3, of the Act of 1903.

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On this question of policy I should like to point out this. Under sect. 43, sub-s. 3, of the Act of 1903, where improvements had been executed by the Land Commission, they were repaid, not the actual moneys expended by them on the improvements, but such sums as represented the increase of price paid by the tenant-purchasers consequent on the improvements, and the deficiency, if any, was borne by the State. The change made by the Act of 1909, sect 30, is that the tenant-purchaser repays by means of the purchase annuity not merely "the increase in price consequent on the improvements," but the money so expended which the section provides is to be treated "as if such money was advanced under the Land Purchase Acts for the purchase of the holding." Thus, as regards improvements executed by the Land Commission, neither the State nor the Land Commission are at any loss. As I have pointed out, this latter section does not apply to the Congested Districts Board. In the case of improvements executed by them, it is not the amount expended on improvements (in the present case £77) which is to be repaid to them under sect. 72, sub-s. 3, of the Act of 1903, but "the increase in the price at which they have been sold to the tenants in consequence of the improvements" (in the present case £66), so that in any event there is here a certain loss of £11 to be met out of the income of the Congested Districts Board. I think it is not difficult to see why this distinction should have been made in the case of the Congested Districts Board, who have to deal with the poorest parts of the country, where the addition to the price of a holding

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of the actual moneys expended on improving it might have caused a burdensome increase of the amount of the annuity, or raised the price beyond the amount for which the holding was security. In considering policy, I suggest that whilst on the one hand it is the duty of the Treasury to safeguard the interests of the taxpayers, on the other hand it should not be forgotten that the Congested Districts Board, constituted as it is of gentlemen of high position, who give their great services to the discharge of their duties, have imposed upon them by the Legislature the task of improving the conditions in life of the most impoverished class of the tenantry of Ireland. I confess I do not think that the burden of loss should be put upon them, for which the Treasury contends in the case, unless such a policy is to be found on a reasonable construction of the statutes. Taking the present as a test case, it will be seen that on this expenditure for improvements upon a small estate their undoubted and inevitable loss is £11 12s. 7d. If that loss is to be increased to a sum of £39 6s. 2d., which would be, as I make out, the result of the Treasury succeeding in their contention—and this is to be a measure of their general loss on sales by them—then, I think, the sphere of usefulness of the Board, so manifest to those who are acquainted with the conditions in the south and west of Ireland, will be very seriously curtailed. I do not think that as a practical measure the Congested Districts Board could obviate this loss by imposing it on the purchasing tenant.

But Mr. Wylie further contends that on the true construction of the section itself—that is, sub-s. 3 of sect. 72 of the Act of 1903—the payment of £66 Immature Guaranteed 3 per cent. Stock, 1939, equivalent to £38 6s. 5d. cash, is in accordance with the true meaning of the sub-section. He says that the Treasury are to pay back to the Congested Districts Board such sum as represents the increase of price consequent on the improvements; that the elements of increased value are represented by the additional annuities, the true value of which is measured by the market value of the corresponding amount of stock, not cash; and that if the Congested Districts Board lose part of the money which they have actually expended, they have only themselves to blame for not having made provision for the difference in their

agreements with the tenants; that the loss is not to fall on the Treasury, and ultimately on the taxpayers.

But having regard to Rules 16 to 21 of the Statutory Rules and Regulations of the 24th January, 1912, as to accumulation and redemption, it appears to me that no loss falls on the Treasury by reason of advances for the purchase of land being made by Stock, nor am I able to see what loss can fall on the Treasury by repayment to the Congested Districts Board in money of moneys actually expended by them on the improvement of an estate which represents the increase of price consequent on the improvements. As far as I can see, the Treasury are in a position to ensure that the tenant-purchasers shall repay in cash the entire advance, including the enhanced price attributable to the improvements. But be this as it may, I think that before I could decide this case in favour of the defendant I should have to be satisfied either that "advance" in sect. 3 of the Act of 1903 is an advance for the purposes of land purchase, or that section 3 of the Act of 1909 has altered or derogated from the rights of the Congested Districts Board under sect. 72, sub-s. 3, of the Act of 1903, because, undoubtedly, under the earlier Act the recoupment of the Congested Districts Board would have been in cash. Now that the provision for paying the vendor has been altered, so that the advance is of less value at the present time, owing to the state of the money market, if this change is sought to be imported into sect. 72, sub-s. 3, of the Act of 1903, must it not be either because "advance" in sub-s. 3 of sect. 72 is an advance for the purposes of land purchase, or that sect. 3 of the Act of 1909 alters or derogates from the rights of the Congested Districts Board under that sub-section? I am of opinion that "advance" in sub-s. 3 of sect. 72 is not an advance "for the purposes of the Land Purchase Act" within the meaning of these words in sect. 3 of the Act of 1909; and I am also of opinion that sect. 3 of the Act of 1909 has not the effect of altering or derogating from the rights of the Congested Districts Board under sub-s. 3 of sect. 72 of the Act of 1903 to repayment in money. I will grant a declaration as asked for by the plaintiffs in their statement of claim.

Solicitor for the plaintiffs: *J. O'Connor.*

Solicitor for the defendant: *J. Donnelly.*

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Feb. 24, 25,
26.
March 19.

Injunction—Libel—Jurisdiction—Judicature Act (Ireland), 1877, sect. 28, sub-s. 8—Practice—Service out of jurisdiction—Rules of the Supreme Court (Ireland), 1905, Order XI, r. 1, sub-s. (g), r. 2.

The plaintiff claimed an injunction to restrain the defendant company from publishing or exhibiting in Ireland advertisements, placards, books, or circulars containing pictures alleged to be caricatures of the plaintiff, and to be calculated to expose him to ridicule or contempt. The Court made an order giving liberty to the plaintiff to issue the writ, and to serve the same out of the jurisdiction in London. On a motion by the defendant company to have the order discharged :

Held, that the Court had jurisdiction to hear and determine the action, and that the order for service out of the jurisdiction was, in the circumstances of the case, rightly made.

MOTION to set aside an order for service of the writ out of the jurisdiction.

An order was made on the 16th January, 1920, giving liberty to the plaintiff to issue a writ out of the jurisdiction, and to serve it on the defendant company in London.

The plaintiff claimed an injunction to restrain the defendants from publishing or exhibiting in Ireland any advertisements or placards, books or circulars, containing pictures representing the plaintiff in absurd or unsuitable costumes, or attitudes, or caricatures, or otherwise calculated to expose him to public ridicule or contempt by misrepresenting his appearance or costume, and for damages and other relief.

The defendant company now applied to have the order of the 16th January discharged, and asked for an order setting aside the writ issued in pursuance of the order, and the service of it and all subsequent proceedings in the action, on the grounds following :—

That the defendants were not domiciled or ordinarily resident within the jurisdiction of this Court ; that the acts to restrain which this action is alleged to be brought were not to be done within the jurisdiction of this Court ; that there was no jurisdiction within the rules of the Supreme Court to make the order ;

that the application for the order was not supported by the evidence required by the rules of the Supreme Court (Ireland), Order 11, rules 2 and 4; that due regard should be had to the amount or value of the plaintiff's claim, and the comparative costs and convenience of proceedings in Ireland and in England, the place of the defendants' residence; that the said order should not have been made, and ought not to stand; that due regard being had to the nature of the action, and to the nature of, and, if granted, the consequences to flow from, the relief sought, the case is not a proper one for service out of the jurisdiction.

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The affidavit grounding the motion for liberty to issue and serve the writ out of the jurisdiction was an affidavit by John Dunlop, the intended plaintiff. He deposed that he was the inventor of the pneumatic tyre, and that about the year 1891, at the request of the then Directors of the Pneumatic Tyre Co. and Booth's Cycle Agency, Ltd., of which company he was then one of the Directors, he presented that company with a portrait bust of himself, and his signature, to be used as a trade mark; that the Pneumatic Tyre Co. and Booth's Cycle Agency, Ltd., were the predecessors of the intended defendant company; that for some time past the intended defendant company had, without any permission from him, been exhibiting in Ireland and elsewhere advertisements containing pictures obviously intended to represent him, the features being adapted from the portrait bust, but that the features were placed upon the body of a very tall man, dressed in a very exaggerated foppish manner, wearing a tall white hat, white waistcoat, and carrying a cane and eye-glass, none of which it was his custom to wear or carry; he said that the gradual extension of these advertisements, and the absurd attitudes in which the figure was represented, had caused very great annoyance to him and to his relatives, almost all of whom resided in Ireland, and the belief had arisen that he had permitted the company to publish these advertisements in consideration of payments to him; that he had repeatedly complained to the company of the above matters, and had recently instructed his solicitor to write to them requiring them to discontinue these acts, and that he was informed and believed that no satisfactory reply could be obtained; that the defendant company was registered

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in England, and was a British company, and had a large and important branch in Dublin, at Dunlop House, Lower Abbey Street; he said that owing to his advanced age—being seventy-nine years old—and to the fact that his health was delicate, it would be highly inconvenient for him to appear as a witness in England, and that he believed that the intended action could be more cheaply and expeditiously tried in Dublin than elsewhere; that all the witnesses for him were resident in Ireland, and that the company had a large branch in Dublin, the officials of which could conveniently attend the trial if required; he said that he was advised and believed that he had a good cause of action against the intended defendants in respect of the matters alleged, and submitted that liberty should be given to him to issue the writ in the intended action, and to serve the same on the intended defendants out of the jurisdiction of the Court; and he said that the principal office of the defendant company was in London.

In support of the present motion, an affidavit was filed on the 12th February, 1920, made by Mr. Arthur Cunningham, the Secretary of the defendant company. In that affidavit the deponent says that the company was registered in England under the Companies Acts, and that their registered office is at No. 1 Albany Street, London, and not at 152 Clerkenwell Road. He says that in the year 1889 the Pneumatic Tyre Co. and Booth's Cycle Agency, Ltd., was formed, and that the company acquired the plaintiff's invention No. 1607, and subsequently changed its name to the Pneumatic Tyre Co., Ltd., and had acquired the two main inventions for attaching and detaching the outer covers of tyres from their rims; that the plaintiff was a director of the Pneumatic Tyre Co. before its change of name, and afterwards down to the year 1895; that prior to his resignation from the Board of Directors, namely, in the year 1893, the Pneumatic Tyre Co., Ltd., registered trade marks of the head, bust, and signature of the plaintiff in respect of goods made and sold by them; that the successors in business and title of the Pneumatic Tyre Co. were the Dunlop Pneumatic Tyre Co., Ltd., registered in the year 1896, whose business patents and trade marks are now vested in the defendant company, the Dunlop Rubber Co., Ltd., who also are the registered proprietors of the registered trade mark

obtained in the year 1901, consisting of the head and bust of the plaintiff, and of a registered trade mark consisting of the word "Dunlop," and that they had also acquired rights to the name Dunlop in connexion with tyres and other goods, and that no person, firm, or company, save the defendant company, possessed the right to use the name Dunlop in connexion with tyres and accessories, and that these trade marks and name are used by the defendant company in connexion with their goods; he says that the defendant company and its predecessors in title have for many years spent annually large sums of money in advertising their goods in trade papers and the daily and weekly press, many of which are published in England and circulate throughout the United Kingdom; that since October, 1915, the defendant company has used in its advertisements the symbolic figure now complained of, and these advertisements have been continually published and circulated throughout the United Kingdom; that their publication has been widespread for over four years, and must have been so used to the plaintiff's knowledge, and he refers to certain letters written by the plaintiff. He says that in 1919 the defendant company compiled a handsome volume called "The Dunlop Book," at a cost exceeding £10,000, and he exhibits the volume; that a presentation copy, as a personal compliment, was sent by the defendants to the plaintiff, and that the plaintiff in acknowledging same on the 18th September, 1919, wrote to the managing director of the defendants a letter which he exhibits, and he says it is the figure therein referred to which forms the ground of the present action for alleged libel. He says that the defendant company denies that any libel on the plaintiff had been committed, or that he has any claim against them whatever, or that he was entitled to any relief by way of injunction or otherwise. He says that if the trial of the action were to take place in Dublin, it would be necessary for the defendant company to call a large body of witnesses on their behalf, including their artists, all of whom reside in England, and that the expense to the company of a trial in Ireland would be very great, and he says that if the plaintiff were to issue a writ in the Chancery Division in England for such relief as is claimed in this action, the state of the list there is such, he is informed by his company's

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Powell J. London solicitor, and believes that the plaintiff would be able
1920. to get a trial before next Easter, and he says that it would be
DUNLOP oppressive and unjust, and, as he submits, contrary to law and
v. fact to implead their firm in Ireland. He says that an injunction
DUNLOP here, while apparently limited to one of the three Kingdoms, must
RUBBER Co. have prejudicial effect in all, as newspapers published in England
containing the defendants' emblematic advertisements circulate
largely in Ireland, and newsagents in Ireland might constantly
be put in peril were a local injunction to prevail in respect of
English and Scottish newspapers, and he submits that this is
therefore pre-eminently a case to be tried in the English Courts,
and that there is no true precedent on which the issue of the writ
out of the jurisdiction in this case can be founded.

The plaintiff made an affidavit, filed on the 20th February, 1920, in reply to the affidavit of Mr. Cunningham, in which he said that none of the letters patent, registered trade marks, or rights referred to in the affidavit include the right to do any of the acts or matters complained of in the action; that it appears from the correspondence referred to in Mr. Cunningham's affidavit, and is the fact that he complained to the defendant company, its officers and directors, of the figures published by them and purporting to represent him, and in particular he objected to the figure published in the Dunlop Book, and forthwith communicated such objection to the defendant company. He says that, in addition to the publication referred to in Mr. Cunningham's affidavit, the defendant company have published and are publishing in Ireland advertisements on hoardings and posters exhibiting the figure complained of, and exhibiting effigies of the like nature in shops and elsewhere; that these pictures, posters, and effigies are not all alike, but are obviously intended to suggest his features, and he refers to two posters which he says he is informed were exhibited in the premises of motor and cycle agents in Dublin, and he submits that having regard to the questions to be decided in the action, it will not be necessary for the defendant company to call a large body of witnesses, or to go to any considerable expense as suggested in Mr. Cunningham's affidavit, and he says that owing to his advanced age and delicate state of health it would be unsafe for him to attend a trial in London, and he exhibits a certificate to

that effect from Dr. Louis Byrne, his medical attendant. He says it would also be highly expensive and inconvenient for him to have a trial in London, as all the witnesses on his behalf reside in Ireland; that it will be necessary to call a considerable number of such witnesses on his behalf; that the injury to him which he seeks to restrain is that which is caused by the publication to his relatives and friends in Ireland of the offensive matters mentioned in the writ of summons, and he submits that he is entitled to maintain the action in the country where such injury has taken place.

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Certain correspondence passed between the plaintiff and the managing director of the defendant company. In Mr. Dunlop's letter of the 18th September, 1919, acknowledging the complimentary volume referred to, he says that the company never asked his leave to make use of his full figure; that, apart from this, he looked upon the advertisements of the Dunlop Co. and the Rubber Tyre Co. as caricatures; they were not like him; that he did not wear a tall hat; that he did not dress like a dude; that he abhorred the idea; that he never wore an eye-glass, and that he never carried a cane, or posed as shown. In Mr. Bergin's reply of the 9th October, 1919, he says that it was not unnatural for the artists of the company to suppose that there would be no objection to extending the portrait of the plaintiff into a full-sized figure symbolizing the company, whose foundation rests upon plaintiff's invention; he says that apart from the fact that it is a general practice to caricature celebrities, so long as the caricatures are not vulgar or intentionally offensive, the practice is universally admitted to be unobjectionable; he says that the case of the company is that the figure used in their publication is not in any real sense a caricature of the plaintiff. The plaintiff, in reply, goes in detail into the matters of which he complains; he refers to some objectionable presentation of his photograph on a former occasion, and he refers to a letter of March 1st, 1911, from Mr. Harvey Du Cros, one of the directors of the company, in answer to a complaint by him, in which Mr. Du Cros says:—"I got the advertisement this morning, which was the subject of my letter of yesterday. I think it is exceedingly stupid and in bad taste." He said that the framers intended it to be complimentary, and,

Powell J. mistaken as they were, that they would not be deliberately,
 1920. intentionally uncomplimentary, which he said would of course be
DUNLOP against their own interests. Mr. Dunlop replied to Mr. Du Cros,
 v. and expressed his gratitude to him for having given instructions
DUNLOP to stop it immediately, and he further states in his letter that
RUBBER CO. there was no need to convey to an intelligent directorate,
 who, he presumed, knew his appearance, that he did not desire to
 be exhibited in such a grotesque fashion.

Healy K.C. and *Hugh Kennedy*, in support of the motion :—

The Court will not grant an injunction in a libel action unless there is a prior finding of a jury: *Saxby v. Easterbrook* (1). The relief by injunction is merely ancillary, and can only be applied when the injuria complained of has been established by the finding of a jury. The claim for an injunction is not bona fide, and the action was framed in this way to attract the jurisdiction of the Court to make an order for service out of the jurisdiction under Order 11, rule 1. Such an order has been made only in cases where some damage was done or threatened to be done to property. The exercise of the jurisdiction of the Court in injunction cases is discretionary, and ought not to be granted except in the clearest cases: *Bonnard v. Perryman* (2). The action is a futile one. It is brought to restrain in Ireland what is and has been done, with the acquiescence of the plaintiff, all over the world. The Courts in Ireland could give only a partial remedy. The injury caused to the defendant company if an injunction were granted would be enormous as compared with the banter complained of by the plaintiff, and in the circumstances of this case no Court would grant an injunction. On these grounds, and on the ground of convenience, the Court will exercise its discretion, and set aside the order for service of the writ out of the jurisdiction: *Marshall v. Marshall* (3); *In re Burland's Trademark* (4); *Egbert v. Short* (5); *Tottenham v. Barry* (6).

(1) 3 C. P. D. 339.

(2) [1891] 2 Ch. 269.

(3) 38 Ch. D. 330.

(4) 41 Ch. D. 542.

(5) [1907] 2 Ch. 205.

(6) 12 Ch. D. 797.

S. L. Brown K.C., J. M. Whittaker K.C., and Newett, for the plaintiff:— *Powell J.*
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Libel cases where an injunction was claimed have in many cases been brought in the Chancery Division: *Hayward v. Hayward* (1). Another question might arise if the defendants claimed the right to have a jury, but here only the question of the jurisdiction of the Chancery Division is raised. That jurisdiction has been altered and enlarged by sect. 28 of the Judicature Act: *Quartz Hill Consolidated Gold Mining Co. v. Beall* (2); *Monson v. Tussauds, Ltd.* (3); *Beddow v. Beddow* (4).
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It has been suggested that the action is futile and not enforceable, but the defendants have one of their branches in Dublin, and the only relief sought is sought in Ireland, and the plaintiff's witnesses are all in Ireland. There has been no acquiescence by the plaintiff, for the nuisance has only gradually grown. Courts of equity have always had power to restrain contemplated attacks on character as well as on property. In *Bonnard v. Perryman* (5) the damage was done to the business, but the injuria was to the character, and the action would have lain without any evidence of damage to property.

Cur. adv. vult.

POWELL J. [having stated the facts as above set out, March 19.
continued]:—

Mr. Healy, on behalf of the defendants, contended that I should discharge the order of the 16th January, 1920, upon several grounds. He argues that this is really an action for an alleged libel; he points to the subject-matter of the alleged libel, namely, the representations of the plaintiff complained of; he says that there is no foundation for saying that they constitute libel on the plaintiff; he says that the plaintiff acquiesced for many years in the publication by the defendants of the representations complained of, and is therefore disentitled to relief; he says that, assuming that these representations are defamatory of the plaintiff, the Court of Chancery will not grant an injunction

(1) 34 Ch. D. 198.

(2) 20 Ch. D. 501.

(3) [1894] 1 Q. B. 671.

(4) 9 Ch. D. 89.

(5) [1891] 2 Ch. 269.

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in a libel action of this character; he says that at any rate the Court will not grant an injunction to restrain the publication of the libel unless and until the matter complained of as libellous has been found to be a libel by a jury. To use Mr. Healy's own words as regards this contention, "You can have no injunction in a libel action unless there is a prior finding of a jury," and he relies upon the judgment of Lord Lindley in *Saxby v. Easterbrook* (1), a case to which I shall refer later on. Putting this contention in another form, as I understand, he says that the relief by injunction is only ancillary and can only be applied as ancillary relief when the wrong, the injuria complained of, has been established by the finding of a jury, and that the present action claiming injunction primarily is not bona fide, and is framed in that way to attract the jurisdiction of the Court so as to justify the application under Order 11, rule 1, and that for these reasons the order complained of is without jurisdiction. He says that, assuming there is jurisdiction to make the order, on the facts disclosed in Mr. Cunningham's affidavits, filed for the purpose of this motion, and not before the Court when the order was made, I should, in the exercise of my discretion, discharge the order, because the application of the plaintiff was not really bona fide; that no sufficient remedy can be given in this action, because the order made in this action cannot be enforced; that the remedy will be partial only; that the intended proceedings are oppressive and vexatious; that the place where the action should be heard is in London, where the advertisement business of the defendant company is organized, carried on, and developed, and where, to use Mr. Healy's own expression, "If the plaintiff is entitled to succeed in restraining the publication complained of, the axe can be laid to the root of the mischief"; that the result of an injunction granted in this country would leave persons selling newspapers and magazines containing advertisements with the prohibited matter exposed to actions at the suit of the plaintiff, and that, having regard to rule 2 of Order 11, I should hold that the balance of convenience is in favour of this action being tried in England, by reason of the fact that the defendants would have to call a large

body of witnesses, including their artists, all of whom reside in England; that the artists referred to will prove that their object was to enable the defendants to attach a symbol for the purpose of advertising their business, and not with any intention to cause or produce ridicule of the plaintiff.

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I think I have set out all the grounds put forward by Mr. Healy. They were put forward with great force. They seem to me to cover every conceivable ground of objection to the order complained of; they seem to me to raise questions of great importance affecting the jurisdiction of this Court in regard to applications under the Order in question, and affecting the proper exercise of judicial discretion upon such applications. Mr. Healy has cited numerous authorities in support of his contentions. I have, therefore, considered it to be my duty to give the matter the most careful consideration of which I was capable, and I think it is also my duty to give in detail the reasons for the conclusions at which I have arrived.

I must deal with this case on the basis that the relief claimed in the action is founded upon the contention that the advertisement and posters complained of constitute a libel on the plaintiff. It may be that if this action comes to trial an additional question may arise on the pleadings as to whether or not, apart from libel, a private person can restrain the publication of a portrait or picture of himself which in the form in which it is published has been designed and published without his authority. The late Lord Collins, when Mr. Justice Collins, in giving judgment in *Monson v. Tussauds, Ltd.* (1), said that he did not wish to express any opinion on this question. It may be that this point may be decided in the present action, whether it be tried in Ireland or in England; but for the purposes of this motion the case must, I think, be dealt with by the standards applicable to the law of libel. Are these advertisements and posters and effigies capable of being held to be defamatory of the plaintiff? One might be inclined to think that when Mr. Healy asks me to decide that they are not defamatory, that requisition is inconsistent with his further contention that since Fox's Act this is a question for a jury and not for a Judge. It is

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plain that Mr. Healy is entitled to make the requisition, because it is well settled that it is for the Judge at the trial to decide whether the matter complained of as being defamatory is capable of being so considered, and it is quite competent, as has been decided in many cases, for the Judge to direct a verdict for the defendant in a libel action on this ground. Under the old system, in *Mawe v. Pigott* (1), the Court of Common Pleas in this country decided on demurrer that the Court would see if there was anything in the publication complained of which by reasonable intendment conveyed an imputation on the plaintiff. Therefore I think Mr. Healy is entitled to ask me to hold that the matter complained of here is not capable of being considered defamatory, and, if I so held, I think it would follow that I should discharge the order. But can I so hold? The publication of written matter, which includes any printed or any other permanent representation, or any picture, statue, or effigy, may be defamatory if it appreciably injures a man's reputation, and the injury may be presumed from the nature of the publication if it disparages the plaintiff or tends to bring him into ridicule or contempt. This has been laid down in ancient times on authority entitled to the greatest respect. In *Cropp v. Tilney* (2), in the reign of William III, a Judge of the highest eminence, Lord Chief Justice Holt, laid it down that scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff, or makes him contemptible or ridiculous. In the case of the *Archbishop of Tuam v. Robeson* (3), decided in 1828, Best C.J., having referred to the judgment of Sir James Mansfield in *Thorley v. Lord Kerry* (4), a case in the Court of Exchequer Chamber, on writ of error from the Court of King's Bench, in which he said that the distinction between written and spoken scandal had been established by some of the greatest names known to the law—Lord Hardwicke, Lord Hale, Lord Chief Justice Holt, and others—goes on to say: "The main distinction between words spoken and words written is that whatever renders a man ridiculous, or tends to lower him in the estimation of the public, amounts to a

(1) 1 R. 4 C. L. 54.

(2) 3 Salkeld, 225.

(3) 2 Moo. & P. 32.

(4) 4 Taunton, 364.

libel when written, although the same words if spoken would not have been a defamation of him." I am not aware that these statements of the law have ever been questioned, and if the picture or representation be of this nature, and if it be held to refer to the plaintiff, I do not think it is material whether it be symbolic or photographic.

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No general rule can be laid down defining absolutely what particular kind of publication of this nature will injure reputation in this sense. It depends to a great extent upon the question as to what class of man it is who complains, and the nature of the thing he complains of. A gentleman, for example, who had adopted the stage for his profession could not, I take it, reasonably object that in an advertisement by way of poster of a theatrical performance in which he takes a part he is depicted in the garb proper to the part which he plays, whereas an ordinary citizen who does not aspire to histrionic fame might legitimately object to notoriety of such a kind, even although he were made to represent a personage of fame and distinction in history, because it would make him merely ridiculous. Again, as has been pointed out by Lord Halsbury, if a man is a public character in respect to whom it might be said that his public life or his great position was calculated to create an interest, it would be unreasonable to suppose that his portrayal in exaggerated form would tend to injure his reputation in the sense of making him an object of ridicule. But the plaintiff in this case is not an actor, nor a public character, nor, as far as I can see, is he a man who seeks for notoriety. He claims to be a plain and ordinary citizen of Dublin, who arrays himself as an ordinary citizen. He complains that it is offensive to him, and calculated to bring him into ridicule and contempt in the eyes of his friends and fellow-citizens that he should be depicted in posters freely placarded in the city in which he resides, in form and appearance entirely different from his real form and appearance, and in a garb which he says he has never assumed, and which he considers to be offensively at variance with his ordinary attire. It is a kind of injury which no doubt we are inclined to regard with considerable complacency, and the complaint is one which is even calculated to cause us amusement when the injury is inflicted on other people,

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but to be judged from a wholly different standpoint if applied to ourselves. And I must have regard to the plaintiff's feelings in this case, and, looking at the posters and advertisements, it is sufficient for me to say that in my opinion the plaintiff is entitled to complain of them on the grounds which he has set out in his letters to which I have referred, and in his affidavit, and I am not prepared to hold that he may not be able to establish at the trial of this action that they are defamatory in the sense which I have indicated; nor do I think I can decide upon this motion that the plaintiff is necessarily disentitled to relief by reason of delay in seeking a remedy, amounting, it is suggested, to acquiescence. No doubt acquiescence in what he complains of, or delay in seeking relief, may in certain circumstances be sufficient to preclude a plaintiff from obtaining that relief. On the other hand, acquiescence in a state of things which produces little injury does not warrant subsequent extension in a way productive of serious injury. In *Johnson v. Wyatt* (1), Lord Justice Turner, having said that in the case before the Court there was sufficient acquiescence to justify the Court in refusing to grant an interlocutory injunction, goes on to say: "But I apprehend that to justify the Court in refusing to interfere at the hearing of a cause there must be a much stronger case of acquiescence than is required upon an interlocutory application, for at the hearing of a cause it is the duty of the Court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost." In *Call v. Oppenheim* (2), a decision of the Court of Appeal in England, Brett M.R., Baggalay and Fry L.JJ., the plaintiff on an ex parte application obtained leave to serve writ out of jurisdiction. Defendant took out summons to rescind on the ground that the matters involved had been determined by a foreign judgment, and that the matter was res judicata. Service was allowed, the Court holding that there was sufficient doubt as to the effect of the judgment, and a question of law arose which might reasonably be argued. Brett M.R. went on to say there was no doubt, if it were shown by the affidavits that there was a contested question of fact, that the

(1) 2 De G. J. & S. 18.

(2) 1 T. L. R. 622.

Court would not inquire into that question, but would confine itself to the inquiry whether the case was brought within the sub-sections. I do not say that on the trial of this action the defence of acquiescence may not be made out. All that I say now is that in my opinion, on the evidence before me at present, it would not be in accordance with authority to decide on this application that this defence had been so fully established as to justify me in holding that the intended plaintiff ought not upon that ground be allowed to proceed with the action.

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Has the Court of Chancery jurisdiction to grant an injunction in an action of libel of the character complained of here? In examining the authorities bearing upon this point, care must be taken to distinguish between interlocutory injunctions and final injunctions. Having regard to Mr. Healy's argument, it becomes necessary to consider the development of the exercise of the jurisdiction of the Court of Chancery to grant injunctions to restrain the publication of libel. In *Du Bost v. Beresford* (1), decided in the year 1810, the plaintiff complained in trespass against the defendant for cutting and destroying a picture of great value which the plaintiff had publicly exhibited. The picture in question was alleged to be a libel upon a gentleman of fashion. Lord Ellenborough, in deciding for the defendant, said that if the picture was a libel upon the person introduced into it, the law could not consider it valuable as a picture. He said that upon an application to the Lord Chancellor he would have granted an injunction against its exhibition, and that the plaintiff was both civilly and criminally liable for having exhibited it. Although this decision is referred to in modern text-books, I think it is quite plain that it was not approved of in those days. It appears to be inconsistent with the dictum of Lord Eldon in *Gee v. Pritchard* (2), with a decision of Lord Langdale in *Clarke v. Freeman* (3), with the decision of Sir L. Shadwell in *Martin v. Wright* (4), and with the judgment of Lord Cottenham in *Fleming v. Newton* (5). The judgment of Lord Cottenham in *Fleming v. Newton* (5) shows, I think, that he agreed with the

(1) 2 Campbell, 511.

(2) 2 Swanston, 402.

(3) 11 Beav. 112.

(4) 6 Simon, 297.

(5) 1 H. L. C. 363.

Powell J. argument that an injunction would not be granted by the Court
 1920. of Chancery to prevent the publication of a libel on the ground
DUNLOP that it would be a usurpation of the authority of a jury and a
v. Court of law, and that the assumption of authority to decide such
DUNLOP a question by a Court of Equity would be the assumption of a
RUBBER Co. new jurisdiction; that a Court of Equity would not exercise the
 functions of a jury, nor would it be set up to be a Court for the
 trial of questions of libel nor to decide questions of fact, which
 could only be properly decided on an issue. In *Gee v. Pritchard* (1),
 Lord Eldon said that the publication of a libel is a crime, and that
 he had no jurisdiction to prevent the commission of crime, except of
 course in such cases as belong to the protection of infants, where a
 dealing with an infant may amount to a crime—an exception
 arising from the peculiar jurisdiction of such a Court.

The judgment of Lord Cottenham in *Prince Albert v. Strange* (2)
 indicates the class of case in which the Court would in those
 days exercise a jurisdiction to grant an injunction before the
 plaintiff had established his right at law. He points out that the
 Court would exercise an original and independent jurisdiction, not
 for the protection of a merely legal right, but to prevent what the
 Court considers and treats as a wrong, whether arising from the
 violation of an unquestionable right, or from a breach of trust,
 confidence, or contract. I think it is clear that in those days an
 injunction would not have been granted to restrain a libel such as
 this is alleged to be. I think that the Court of Chancery proceeded
 upon the basis that a libel was a crime, and that they had no
 jurisdiction to punish crime, and, after Fox's Act, for the further
 reason that libel or no libel was, so far as criminal libel was con-
 cerned, a matter to be decided by a jury, and in civil actions
 since Fox's Act the practice was to consider that it was the
 function of a jury to decide this matter also.

But it will appear that the jurisdiction of the Court to
 grant an injunction even where the matter complained of
 amounted to a crime was extended by Judges sitting in
 Chancery. In *Springhead Spinning Co. v. Reilly* (3), which was a
 bill praying for an injunction to restrain the issue of placards and
 advertisements alleging that the defendant had intimidated and

(1) 2 Swanston, 402. (2) 1 M.N. & G. 25. (3) L. R. 6 Eq. 551.

prevented workmen from hiring themselves to the plaintiffs, it was held that the acts of the defendants, as alleged by the bill, amounted to crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. Vice-Chancellor Malins, having referred to Lord Eldon's judgment in *Gee v. Pritchard* (1), says that the jurisdiction of this Court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable or comfortable for use and occupation, and (at page 560) he says: "The truth I apprehend is that the Court will interfere to prevent acts amounting to crime, if that do not stop at crime, but also go to the destruction or deterioration of the value of property." He refers to the judgment of Lord Justice Turner in *Emperor of Austria v. Day* (2), in which he said: "It is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent. The jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective. I do not agree to the proposition that this Court is bound to send a matter of this description to be tried at law." Vice-Chancellor Malins then refers to the rule laid down by Lord Eldon in the celebrated case of *Macaulay v. Shackell* (3), in which Lord Eldon said the Court of equity has no criminal jurisdiction, but it lends its assistance to a man who has in the view of the law a right of property, and who makes out that an action at law will not be sufficient remedy and protection against intruding upon his publication. He disagrees with the decision of Lord Langley in *Clarke v. Freeman* (4), and says that that decision may now be considered erroneous for the reasons stated by Lord Cairns in *Maxwell v. Hogg* (5). In *Dixon v. Holden* (6) the head-note is: "The Court has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting

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(1) 2 Swanston, 402.

(2) 3 D. F. J. 217.

(3) 1 Bli. N. S. 96.

(4) 11 Beav. 113.

(5) L. R. 2 Ch. 310.

(6) L. R. 7 Eq. 488.

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of money, or of professional reputation by which property is acquired. The publication of a notice stating that the plaintiff was a partner in a bankrupt firm restrained." Vice-Chancellor Malins says:—"I am told that a Court of equity has no jurisdiction in such a case as this, although it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in land; another in goods; another in a business; another in skill; another in reputation. Whatever may have the effect of destroying property in any one of these things, even in a man's good name, is, in my opinion, destroying property of a most valuable description." He says it is contended that Lord Cottenham has laid it down in *Fleming v. Newton* (1) that the Court had no jurisdiction to restrain the publication of a document like this. But he finds that Lord Cottenham abstained from laying down a rule in that case, but had expressed a hope that Judges would take care to exercise the jurisdiction of the Court with discretion and consistency. He says:—"In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document which if permitted to go on would have the effect of destroying the property of any person, whether that consists of tangible or intangible property; whether it consists of money or reputation."

But in *Prudential Assurance Co. v. Knott* (2), decided in 1875, the Court was asked by an insurance company to grant an injunction to restrain the continued publication of a pamphlet commenting on certain returns of various insurance companies with regard to the comparative expense of their establishments as compared with their liabilities, and it was said that the expressions in the pamphlet would be injurious to the plaintiffs in their trade or business; but, although the head-note indicates that *Dixon v. Holden* (3) was over-ruled, Lord Cairns in referring to it said that he did not mean to say that the decision was not capable of being maintained. But he did say that he was unable to accede to the general propositions of the Vice-Chancellor in that case, as he said they appeared to him to

(1) 1 H. L. C. 363.

(2) L. R. 10 Ch. 142.

(3) L. R. 7 Eq. 488.

be at variance with the settled practice and principles of the Court; and he certainly said that the Court of Chancery would not interfere in cases in which actions were brought for libel, even when these libels had an effect upon their character and upon their trade or business, or their character as connected with their trade or business.

But in 1877, after the Judicature Act was passed and had come into operation, in *Thorley's Cattle Food Co. v. Massam* (1) the Court was of opinion that, notwithstanding the decision in *Prudential Assurance Co. v. Knott* (2), it now had power by the Judicature Act, sect. 25, sub-s. 8, to restrain the publication of such an advertisement, but declined to do so upon the interlocutory application. The writ was for an injunction and for damages, and the plaintiffs moved for an injunction to have the advertisement complained of stopped pending the trial, and argued that if the Court should consider itself fettered by the case of the *Prudential Assurance Co. v. Knott* (2) there was further power now given to the Court by the Judicature Act, 1873, sect. 25, to grant an injunction in all cases in which it should appear to the Court to be just or convenient that such order should be made. Vice-Chancellor Malins in his judgment said that he was inclined to think that counsel was right in his construction of the 8th sub-section of sect. 25 of the Judicature Act in saying that it did arm the Court with a power which possibly it had not before. He said he was very much inclined to think upon the true construction of that section that whenever the Court sees that an injunction ought to be granted it may be granted, and he considered therefore that he was not fettered by the case of *Prudential Assurance Co. v. Knott* (2), but on the whole he thought it better not to grant an interlocutory injunction, and suggested that the defendants should alter the advertisement, and expunge that which was calculated to mislead.

In the following year (1878) the case of *Beddow v. Beddow* (3) was decided. In that case Sir George Jessel said that it was to be remembered that the jurisdiction of the Court of Chancery to grant injunctions was formerly limited. It was limited by the practice of different Chancellors. The jurisdiction was never

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(1) 6 Ch. D. 582.

(2) L. R. 10 Ch. 142.

(3) 9 Ch. D. 89.

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extended in modern times beyond what was warranted by the authorities, and in course of time various vexatious and inconvenient restrictions were adopted. The granting of an injunction was always looked upon as an extraordinary exercise of jurisdiction, but it was not so now. He said that one of the most useful functions of a Court of Justice was to restrain wrongful acts, and a power of this kind was given to the Common Law Courts in the largest terms by the Common Law Procedure Act, 1854. He then says, when we come to the Judicature Act, 1873, we find this: 1, all jurisdiction whatever which was exercised by any of these Courts was transferred to the new Court; next, all Acts of Parliament applying to any one of the old Courts apply to the High Court of Justice, which consequently has jurisdiction to grant injunctions whenever it may seem just. He referred to sect. 25, sub-s. 8, of the Judicature Act, and says that a mandamus or injunction might be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just and convenient. He says, if this can be done on interlocutory application, a fortiori it can be done at the trial of the action on the principle of *omne majus continet in se minus*. He says: "In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so, and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons and settled legal principles."

In *Hinrichs v. Berndes* (1), an action in the Chancery Division (decided in the same year), there was a motion to restrain the defendant from publishing a circular which it was alleged would interfere with the plaintiff's trade. The indorsement on the writ claimed an injunction only, but not damages. The Master of the Rolls ordered the motion to stand over until the hearing, and observed that he was not prepared to say that if under the Judicature Act a plaintiff could sustain an action for libel, this Court would not at the hearing, while awarding damages for the libel, restrain the continuance of its publication. In the same year was also decided a case relied upon by Mr. Healy, namely,

Saxby v. Easterbrook and Another (1). This was a Common Law action in which the plaintiff claimed £1000 damages from the defendants for printing and publishing a libel concerning the plaintiff, the innuendo substantially being that the plaintiff had dishonestly and improperly pirated an invention. He also claimed an injunction to restrain the defendants from publishing libels against the plaintiff. The jury found that the publications were libellous, and a verdict was taken against one of the defendants for forty shillings with costs, and after verdict Lord Coleridge ordered that a perpetual injunction should issue to restrain the defendants from publishing matter of the nature complained of. A doubt, however, had been suggested as to the power of the Judge at Nisi Prius to order an injunction to issue. The matter came before Lord Coleridge C.J. and Mr. Justice Lindley, as he then was. Lord Coleridge, in giving judgment, said that as it seemed to be doubtful whether upon the cases in equity the injunction which he had granted could be granted for the purpose of restraining the publication of a libel, it had been thought right to make the application to the Court. He said: "Libel or no libel since Fox's Act is of all questions peculiarly one for a jury, and I can well understand a Court of Equity declining to interfere to restrain the publication of that which has not been found by a jury to be libellous. Here, however, the jury have found the matter complained of to be libellous, and it is connected with the property of the plaintiff, and calculated to do material injury to it. It is that which is sought to be restrained, and upon principle it appears to me to be a proper thing to do. My brother Lindley, who is more conversant with these matters than I am, says that all the cases where Courts of Equity have refused to interfere were cases where the application was made before verdict. Here the jury have found the publications to be libellous, and they are eminently calculated to injure the plaintiff's property in the patent rights which are assailed." Lord Coleridge said that if the cases cited did not help them, they were not in the way; all but one of them seemed to be confined to interlocutory orders. Lindley J. said that he was not aware of any case in equity which was precisely in point: "The principle upon which Courts of Equity have acted in declining to

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Powell J. restrain publication of matter alleged to be libellous is that the question of libel or no libel is pre-eminently for a jury. But when a jury have found the matter complained of to be libellous, and that it affects property, I see no principle by which the Court ought to be precluded from saying that the repetition of the libel shall be restrained." This judgment was delivered on March 25th, 1878, and the judgment of Sir George Jessel in *Beddow v. Beddow* (1) was delivered on the 17th April, 1878.

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No doubt the case of *Beddow v. Beddow* (1) was not a case of libel, and therefore when Sir George Jessel says that he has unlimited power to grant an injunction in any case where it would be right and just to do so, and that what was right or just must be decided according to sufficient legal reasons and on settled legal principles, it might have been said at that time that he cannot be taken as deciding that the Court of Chancery would grant an injunction, either interlocutory or final, in a case of libel, although some of the cases to which I have already referred would show that the Court of Chancery would, even at that date, have assumed jurisdiction to grant an injunction restraining the publication of libellous matter affecting property, and I certainly do not think that the judgments in *Saxby v. Easterbrook* (2) can be taken as deciding that it is not within the jurisdiction of a Judge of the Chancery Division of the High Court since the Judicature Act to hear and determine actions relating to libellous publications injurious to property in which the remedy sought is by way of injunction.

In 1880 *Thorley's Cattle Food Co. v. Massam* (3) was decided. It was an action in the Chancery Division for an injunction to restrain the defendants from making certain representations in their advertisements calculated to injure the plaintiffs. Apparently Vice-Chancellor Malins relies upon the judgments in *Saxby v. Easterbrook* (2). He refers to other cases, and says that the cases thoroughly establish this. "I do not [he says] go into the general question of libel, but they have established this doctrine that where one man publishes that which is injurious to another in his trade or business, that publication is actionable, and being actionable will be restrained by injunction, because it is a wrong which

(1) 9 Ch. D. 89.

(2) 3 C. P. D. 339.

(3) 14 Ch. D. 763.

ought not to be repeated." For the purpose, if necessary, of bringing the case within the decisions, he, as a jury, assessed the plaintiff's damages at 40s., and upon that he granted the injunction. This decision was affirmed by James, Baggally, and Bramwell LJJ., in the Court of Appeal, notwithstanding that the case of the *Prudential Assurance Co. v. Knott* (1) and the case of *Saxby v. Easterbrook* (2) were both relied upon by counsel for the appellants. Lord Justice Bramwell says: "I am satisfied that this was a libel on the plaintiffs in the way of their trade, and calculated to do them injury, and consequently an action is maintainable with reference to the advertisement as well as with reference to the circular"—that is, an action in the Chancery Division.

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Now, that case seems to establish the proposition that, notwithstanding the decisions in *Prudential Assurance Co. v. Knott* (1) and *Saxby v. Easterbrook* (2), a Judge of the Chancery Division can hear and determine a case in which the question of libel on the plaintiffs in the way of their trade and calculated to do them injury is in issue, and that if the Judge decides that it is a libel of such a character, he can assess the damages and grant an injunction.

In the same volume, at page 864, the case of *Thomas v. Williams* (3) is reported. That action was brought to restrain the issue by the defendants of trade circulars which the plaintiff alleged to be libellous and injurious to his trade, and for damages; and it was brought in that form in the Chancery Division, and was heard by Mr. Justice Fry, a Chancery Judge. Counsel for the defendant relied on, amongst other cases, *Clarke v. Freeman* (4), and apparently contended that the judgment of the Master of the Rolls in *Beddow v. Beddow* (5) could not be held to apply to an action to restrain a libel, and argued that if the Court could not, without a jury, determine whether a publication was a libel, it could not be just or convenient to grant an injunction to restrain a publication on the ground that it was a libel. Mr. Justice Fry, in giving

(1) L. R. 10 Ch. 142.

(2) 3 C. P. D. 339.

(3) 14 Ch. D. 864.

(4) 11 Beav. 112.

(5) 9 Ch. D. 89.

Powell J. judgment, said it had been urged that the plaintiff was suing upon a libel, and that since Fox's Act no relief could be given by any Court upon a libel, unless the libel had been in the first place submitted to the decision of a jury. He said that that objection appeared to him to be entirely untenable, because, when Fox's Act is looked at, it is plain that it applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel. He said the Judicature Act had pointed out the mode in which actions might be tried, and according to his view an action for libel might be tried under the Judicature Act in the same manner as any other action; that is to say, the right of determining which of the various modes of trial indicated by the rules is to be pursued rests in the first place with the plaintiff, subject to a change in the mode of trial, either at the discretion of the Court itself, or by the direction of the Court upon the application of the defendant. He referred later on to the argument that this being a libel no injunction ought to be granted in respect of it. He says: "I am at a loss to see why a libel affecting property or trade may not be the subject of injunction." The learned Judge seems to have relied on *Saxby v. Easterbrook* (1) as a decision in favour of his statement. He refers to *Thorley's Cattle Food Co. v. Massam* (2), which, he pointed out, went before the Court of Appeal, and he said that the three Lords Justices who heard it all agreed in the view that the statement then in question was a libel, and that as such a libel it ought to be restrained, and he points out that Lord Justice James, one member of the Court, was a party to the decision in *Prudential Assurance Co. v. Knott* (3), and he granted a perpetual injunction to restrain the defendant from issuing or permitting the issue of the circular in question.

If I may respectfully say so, I think that the learned Judge went too far when he said that because Fox's Act applied in terms only to proceedings by way of criminal information or indictment for libel, it had nothing whatever to do with civil actions based upon libel. That is, strictly speaking, accurate, because the Act undoubtedly deals with criminal libel only, but,

(1) 3 C. P. D. 339.

(2) 14 Ch. D. 763.

(3) L. R. 10 Ch. 142.

by analogy, ever since that Act has been passed it has been applied to civil actions for libel. But this does not in any way alter the clear decision of Mr. Justice Fry, that a Judge of the Chancery Division may hear and determine a libel action involving injury to trade, and grant an injunction if he should find that there is a libel.

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In 1882 *Quartz Hill Consolidated Gold Mining Co. v. Beall* (1) was decided. The plaintiffs commenced an action to restrain the publication by a solicitor acting for shareholders of a circular containing strong reflections upon the mode in which the company had been brought out, and on the conduct of the promoters. Plaintiffs applied for an interlocutory injunction, which was granted by Vice-Chancellor Bacon. It was held on appeal that the Court had jurisdiction to interfere on an interlocutory application to restrain the publication of a libel, but that this jurisdiction is to be exercised with great caution, and will not in general be exercised unless the applicant satisfies the Court that the statements in the document complained of are untrue, and that still more caution was requisite where the document in question was, *prima facie*, a privileged communication; and the Court not being satisfied on the evidence that the statements in the document were false or malicious, the order for an injunction was discharged, but the Master of the Rolls, Sir George Jessel, said that he had no doubt whatever that there was jurisdiction to grant such an injunction; that it was plain that the jurisdiction conferred on the Common Law Courts by the Common Law Procedure Act extended to the granting of such an injunction. He then referred to the Judicature Act, and said that the result was that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel, and he referred to what he had said in *Beddow v. Beddow* (2). But, he said, it was a jurisdiction which must be very carefully exercised, and that where there was a case to try, and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction, and in the case before him, he said, he saw no sufficient reason for taking the circular out of the protection of privilege, and that that was

(1) 20 Ch. D. 501.

(2) 9 Ch. D. 89.

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one of the reasons why he thought the motion should not have succeeded. Lord Justice Baggally said that from the time when the Common Law Procedure Act became law until the passing of the Judicature Act the Courts of Common Law had a more extensive jurisdiction as regards the granting of injunctions than the Court of Chancery; that the cases in which the Court of Chancery could grant injunctions were of certain limited though well ascertained classes, but the language of the Common Law Procedure Act authorized the granting of an injunction in all cases of breach of contract or other injury, where the party injured was entitled to maintain and had brought an action. He then referred to the Judicature Act, which, he said, conferred on the High Court all the powers and authorities possessed by the Courts of Common Law as well as those possessed by the Court of Chancery previously to the passing of the Act. The High Court, he says, therefore, now has the full and extensive power which Courts of Common Law had before the Judicature Act. He said the power had been exercised since the passing of the Judicature Act in a variety of cases, amongst which were *Beddow v. Beddow* (1) and *Thomas v. Williams* (2); and that he entirely assented to the view taken by the learned Judges who decided those cases. He said had this been a case of an injunction at the hearing and not upon an interlocutory application, he should have been very much disposed to think that it was within the jurisdiction of the Court of Chancery under its old practice; and he refers to the case of *Thornley's Cattle Food Co. v. Massam* (3) as illustrating the view he had expressed. Lord Justice Lindley, who was a party to the decision in *Saxby v. Easterbrook* (4), said that as to the question of jurisdiction he was satisfied from the cases of *Thomas v. Williams* (2) and *Beddow v. Beddow* (1) that there was jurisdiction to grant injunctions to restrain libels, and that it was very important that this should be known; and he said that it was right, when the evidence and the facts warranted it, to exercise that jurisdiction even upon interlocutory applications, because prevention was better than cure, and an injunction to stop the publication of a libel was a great deal better than an action for damages in consequence of its publication.

(1) 9 Ch. D. 89.

(2) 14 Ch. D. 864.

(3) 14 Ch. D. 763.

(4) 3 C. P. D. 339.

Now, this seems to me to be a case of the highest authority, and it certainly appears to me to establish that since the Judicature Act undoubtedly a Judge of the High Court, being a Chancery Judge, had power to determine whether a publication complained of was or was not a libel, and, if he thought it was, to grant an injunction; and certainly the words used by the Master of the Rolls, Lord Justice Baggally, and Lord Justice Lindley do not in terms restrict that jurisdiction to the case of libels causing injury to property.

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In 1884, in the case of *Hermann Loog v. Bing* (1), it was held by Mr. Justice Pearson and the Court of Appeal that the Court, that is, a Judge of the Chancery Division, had jurisdiction to restrain a person from making slanderous statements calculated to injure the business of another person, and that the jurisdiction extended to oral as well as to written statements, although it required to be exercised with greater caution as regards oral statements, and that in the present case an injunction ought to be granted. The judgment of Lord Justice Bowen, as regards the jurisdiction of the Court of Chancery to grant such an injunction, seems to me not to go further than the case of libel affecting property or trade; but Lord Justice Fry says that he conceives that the Court has plainly jurisdiction to grant injunctions against slander as well as against libel, referring to these two causes of action in general terms.

In 1886 *Hayward & Co. v. Hayward & Son* (2) was decided. It was an action to restrain the publication of an alleged trade libel and for damages; and Mr. Justice North, having come to the conclusion that the circular complained of was libellous, assessed the damages at £5, and declared the plaintiffs entitled to an injunction.

In 1891 *Bonnard v. Perryman* (3) was decided. It was a case also very much relied upon by Mr. Healy. The statement of the case in the report begins in the following way:—"This was an action for libel." If it was, it was an action for libel in the Chancery Division. The writ was indorsed with a claim for an injunction to restrain the defendant from selling and circulating the matters complained of, and claimed £5000

(1) 26 Ch. D. 306. (2) 34 Ch. D. 198. (3) [1891] 2 Ch. 269.

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damages for libel. A motion was made on behalf of the plaintiff for an ad interim injunction till trial in the terms of the claim for injunction indorsed on the writ. Mr. Justice North in his judgment said that the defendant had contended that nothing should be done at that stage, that the question was one that ought to be tried by a jury, and that he had a right to have it tried by a jury, which was a far better tribunal than any Judge could be; and, he said, so far as that goes, he quite agreed that a jury was the proper tribunal to decide whether the matter complained of was or was not libel; but he said that he had to consider whether the publication of the article should or should not be continued in the meantime, and that, inasmuch as he had come to the conclusion that unless he restrained it, it would be continued, he had no course but to consider for himself as well as he could whether it was a case in which an interlocutory injunction should be granted. He referred to several cases, to some of which, but not all, I have referred. He said that he was satisfied that if the matter was before a jury now upon the evidence before him, there was not a jury in England that would say there should be a verdict for the defendant. This, of course, did not touch what might be the case when the action came to be tried, and he said he had come to the conclusion that an injunction must be granted in the terms which he mentioned. On the hearing of the appeal in that case, I think Lord Cozens-Hardy, who was then counsel for the appellant, put the argument as strongly as it was capable of being put upon the lines of Mr. Healy's argument in the present case; but it is plain that he did not consider he could go as far as Mr. Healy, I think, has gone in the present case. He contended that there was no jurisdiction to grant an interlocutory injunction in a libel action when the defendant deposed that he would be able at the trial to justify the libel; that before the Judicature Act a Court of Chancery had no jurisdiction to restrain the publication of a libel, and he referred to *Prudential Assurance Co. v. Knott* (1) and *Fleming v. Newton* (2). He said that since the Judicature Act it had no doubt been held that every Division of the High Court had jurisdiction to restrain by injunction the publication

(1) L. R. 10 Ch. 142.

(2) 1 H. L. C. 363.

of a libel, but that it had always been said that an interlocutory injunction would not be granted except in very special circumstances, and that the jurisdiction must be exercised with great caution. The Court consisted of Lord Coleridge, Lord Esher, Lord Lindley, Bowen, Lopes, and Kay, all of them Judges of great eminence. Lord Coleridge read the judgment of the Court. He said two questions were necessary to be decided: Was there jurisdiction in the Court to issue an injunction to restrain the publication of an alleged libel, either at all or before the libel had been adjudged to be such? and, secondly, was the present a case in which, as a matter of discretion, the jurisdiction should be exercised if it existed? As to the first point, he said they were unable to entertain any doubt. The point was clear, and was settled by authority. He said the authorities were few and recent, for very obvious reasons, but they were uniform and clear. He said that prior to the Common Law Procedure Act neither Courts of Law nor Courts of Equity could issue an injunction in such a case as this; not Courts of Equity, because cases of libel could not come before them, nor Courts of Law, because prior to 1854 they could not issue injunctions at all. But he pointed out that the Common Law Procedure Act conferred on the Courts of Common Law the power if a fit case should arise to grant injunctions at any stage of a case in all personal actions of contract or tort, with no limitation as to defamation. He said that this power was, by the Judicature Act, conferred upon the Chancery Division of the High Court, representing the old Courts of Equity; that nevertheless, although the power had existed since 1854, there was no reported instance of its exercise by a Court of Common Law till *Saxby v. Easterbrook* (1), which was decided in 1878. He said that in that case the injunction was not applied for, nor, of course, granted, until after a verdict and judgment had ascertained the publication to be a libel. He said that that case was acquiesced in, and about the same time the Chancery Division began, and it has since continued, to assert the jurisdiction which has been questioned of granting injunctions on the interlocutory application of one of the parties to an action for libel: "We do not

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doubt, upon the true construction of the statutes, and upon authority, that as a matter of jurisdiction Mr. Justice North's order might lawfully be made." He then deals with the question of the caution required in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong; and, having regard to the facts in the particular case, they held that the interlocutory injunction should not be granted.

If I am to apply this decision to the case before me, I should say that if this were a motion for an interlocutory injunction, there are circumstances connected with the matter which might cause me to refuse the motion; but I think it is an undoubted authority for the proposition that a plaintiff may bring an action for an injunction founded upon a libel in the Chancery Division, and that the Court will grant one in a proper case. In all these cases it will be observed that the relief primarily sought was an injunction, and I think that is a sufficient answer to the argument of Mr. Healy that an injunction is only ancillary to other relief, and that this relief cannot be granted unless and until there is a verdict of a jury finding that the matter complained of is a libel. This, I think, is recognized by the advisers in England of the intended defendants, who suggest in the affidavit of Mr. Cunningham that this action could be tried in the Chancery Division in England before Easter.

In *Monson v. Tussauds, Ltd.* (1), the matter complained of was the exhibition of a portrait model of the plaintiff with other wax figures representing celebrated and notorious personages. The plaintiff sued the proprietors of the exhibition for libel, and applied for an interlocutory injunction to restrain the defendants from exhibiting the figure of himself pending the trial of the action, the defence being simply that the exhibition was not libellous. The Queen's Bench Division (Mathew and Collins JJ.) held that the case was so clearly one of libel that a verdict to the contrary ought to be set aside as unreasonable, and that therefore an interlocutory injunction ought to be granted. On the appeal it appeared from further affidavits filed that there was a question to be tried as to whether the plaintiff had consented to

(1) [1894] 1 Q. B. 671.

the exhibition complained of. It was held by the Court of Appeal (Halsbury, Lopes, and Davy) that that being so, according to the rule laid down in *Bonnard v. Perryman* (1), an interlocutory injunction ought not to be granted. But it was held by Lord Halsbury that the decision of *Bonnard v. Perryman* (1) cannot be considered as laying down an absolute rule limiting the jurisdiction given to the Court by the Judicature Act to grant an injunction by interlocutory order where it shall appear to them to be just or convenient; he said that but for the questions raised by the further affidavits in the case then before the Court, a clear case of libel having been shown, the injunction ought to have been granted. It was stated by Lord Halsbury and Lord Davey, in the clearest way, that the jurisdiction to issue injunctions in cases of libel was not confined to cases of libel affecting trade or business. Of course it follows from the decision of Mathew and Collins in the Court below that the jurisdiction to issue injunctions in cases of libel was not confined to cases of libel affecting trade or business, because they actually granted an interlocutory injunction. Lord Halsbury said in his judgment (at page 690): "Something was said as to the procedure being only applicable to trade libels. I think the suggestion is quite unfounded. The Court of Chancery had no jurisdiction in libel cases, but it had jurisdiction to issue injunctions to restrain injuries to trade, and efforts were occasionally made to treat libels as injurious to trade so as to bring them within the jurisdiction which the Court of Chancery was empowered lawfully to exercise; but whatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the Court shall think it just and convenient, the remedy exists. I should have thought protection of a man's character much more important than the protection of his trade." Lord Justice Lopes says (at page 692): "Libels are generally in writing or printing, but this is not necessary. The defamatory matter may be conveyed in some other prominent form; for instance, a statue, a caricature, an effigy, chalk marks on a wall, signs or pictures may constitute a libel. The plaintiff's case therefore is libel, and this application for an interlocutory injunction must be determined upon the

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(1) [1891] 2 Ch. 269.

Powell J. principles which are applicable to the granting of injunction in
1920. the case of libel." He says that the mode of restraining libels on
DUNLOP interlocutory motions for injunction was thought of such impor-
v. tance that the question was in *Bonnard v. Perryman* (1) argued
DUNLOP before the full Court of Appeal. Lord Justice Davey, in his
RUBBER CO. judgment, said: "I ought to add that I see no logical distinction
for this purpose between a case of libel affecting trade or property
and one affecting character only."

From a consideration of all these cases it appears to me to be plain that a Judge of the Chancery Division, being a Judge of the High Court, has jurisdiction to hear and determine whether or not an injunction should be granted to restrain the publication of libel, even though the libel is not alleged to be injurious to trade, and that in the exercise of this jurisdiction there is no logical distinction between a case of libel affecting trade or property and one affecting character only; but that when a Judge is asked to grant an interlocutory injunction to restrain the publication of a libel pending the trial, he must have scrupulous regard to the decision in *Bonnard v. Perryman* (1). Having regard to these authorities, I do not feel at liberty to question the right of the plaintiff to bring this action in this Court in the form in which it is brought; and I think that if I were to discharge the order in question on the ground that he has no such right, I should be declining jurisdiction in a matter in which I have jurisdiction.

The plaintiff being entitled, in my opinion, to bring the action, whatever its ultimate fate may be, against the defendants in its present form, had I jurisdiction to make the order of the 16th of January? It is not disputed by the defendants that the matters complained of are being published by way of advertisement, by means of posters and otherwise, within the jurisdiction; and the defendants claim, as far as I can see, the right to continue the publication. It seems to me, therefore, that this case is brought within the very words of the rule. In *Tozier v. Hawkins* (2) the plaintiff's claim was for an injunction to restrain the defendants from writing or publishing any libels of the plaintiff or of his wife, and to restrain the defendants from sending to them through

(1) [1891] 2 Ch. 269.

(2) 15 Q. B. D. 650.

the Post Office or otherwise any libellous, defamatory, or obscene post-cards, libellous pictures, or caricatures similar to those which had been already sent to the female plaintiff, and for damages. The High Court in England gave leave to issue the writ and to serve it thus indorsed in Dublin, where the defendant resided. The defendant moved to set it aside for want of jurisdiction. It was conceded that delivery of the post-cards in England would be publication in England, and that the post-cards were of a libellous character. But the point was taken that the injunction if issued could not be enforced, the remedy being only by attachment, and the defendant having no residence in England. The Court (consisting of Coleridge C.J. and Cave J.) was of opinion that the rule gave abundant jurisdiction in the case, and that, as regards the remedy, that part of the order at all events could be enforced.

Mr. Healy suggested that the reason why, or part of the reason why, the order was made in that case was because the defendant was estopped by Order 70, rule 2, he having entered an appearance in the action; and certainly the last line in the head-note, namely, "Objection after appearance too late, Order 70, rule 2," would seem to give support to that argument; but it will be seen that Lord Coleridge in his judgment does not refer to this or make it any ground of his judgment. The case went to the Court of Appeal (page 680 of the same Report), and Brett M.R., Baggallay and Bowen L.JJ., affirmed the order of the Divisional Court, the Master of the Rolls saying that if the injunction was granted it could be enforced whenever the defendant came within the jurisdiction. There is no reference in the report of the case before the Court of Appeal to Order 70, rule 2. But then Mr. Healy says that this was a case in the Queen's Bench Division, and that the present case is King's Bench Division work; but, as I have pointed out, I am satisfied that a Chancery Judge, since the Judicature Act, has jurisdiction in such a case.

Then Mr. Healy has asked me, in the proper exercise of my discretion, to say, for the reasons which he has indicated and to which I have referred, that this is not a case in which service out of the jurisdiction should be allowed. These reasons are—some of them—independent of, and some of them arising upon, the application of rule 2 of Order 11, which is as follows:—"Where leave

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is asked from the Court or a Judge to serve a writ or notice thereof under the last preceding rule, the Court or Judge to whom such application shall be made shall have regard to the amount or value of the claim or property affected, and to the comparative cost and convenience of proceedings in Ireland or in the place of the defendant's residence, and particularly in cases of small demands, where the defendant is resident in England or Scotland, to the powers and jurisdiction, under the statutes establishing or regulating them, of the County Courts in England, and of the Sheriff's Court or Small Debts Court in Scotland respectively"; and the authorities which Mr. Healy cited, and to which I must refer, deal, as to some of them, with the exercise of discretion in this matter both apart from and arising upon the application of the rule in question: *Marshall v. Marshall* (1). In this case leave to issue a writ in England was refused, as appears from the judgment of Cotton L.J., because the English Courts could not enforce an injunction against the defendant himself, but only against his servants and agents in England, who were not the persons primarily liable, while, on the other hand, the Scotch Court could enforce its orders against the defendant himself; and that therefore there was no sufficient reason for withdrawing the case from the Scotch Courts. But in *In re Burland's Trade Mark* (2), in an action to restrain the infringement of the plaintiff's registered trade mark, the defendants, being a company having its registered office in Glasgow, with branches in London, Manchester, and Hull, leave to serve the writ out of the jurisdiction was given, as an injunction could be enforced by sequestration against the property of the company in England. Mr. Justice Chitty in his judgment points out that the reason for the decision in *Marshall v. Marshall* (1) was that the right mode of proceeding to enforce an injunction against an individual was by attachment against the offending party himself, but that that reason did not apply to the case before him; and he referred to the observations on this point of the Master of the Rolls in *Tozier v. Hawkins* (3), and to the fact that in the case before him the defendants had branch offices within the jurisdiction, and that the right mode of proceeding against a corporation was by sequestration, which could be put in

(1) 38 Ch. D. 330.

(2) 41 Ch. D. 542.

(3) 15 Q. B. D. 650.

force within the jurisdiction. It is sufficient for me to say in this case, as has been pointed out by Mr. Brown, that the intended defendants have a branch office of considerable importance in Dublin, and it appears to me that the remedy could be enforced here by sequestration.

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The facts in *Logan v. The Bank of Scotland* (1) were very peculiar, and bear no resemblance whatever to the case before me, but the judgment of Sir Gorrel Barnes, who, with the Master of the Rolls and Lord Justice Romer, constituted the Court, clearly indicates the grounds upon which proceedings in such a case would be stayed when such proceedings are vexatious and oppressive, and an abuse of the process of the Court. He pointed out that in the particular case the action was purely a Scottish action, and all the transactions which gave rise to the alleged cause of action—which was one of misrepresentation—took place exclusively in Scotland; that all the parties to the action resided in Scotland, with the exception of one defendant, who resided in London; that the only branch of the bank outside Scotland was one in London, but that the London branch appeared to have taken no part, and was not concerned in any of the matters in question in the action; that it was clear from the affidavits that all the circumstances upon which the plaintiffs relied in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto would have to be obtained from Scotland; that if the action were to be fought out it was obvious that a large number of witnesses, all of whom resided in Scotland and none in England, would have to be called; that numerous books, documents, and papers relating to the matters in question which would have to be produced were in Scotland, and that possibly also a consideration of Scottish law as affecting the rights and liabilities of the respective parties would arise, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great as to be a great oppression upon them if they were obliged to produce and keep their witnesses and documents in London during the time of the trial; in fact, that the inconvenience would be so great and

(1) [1906] 1 K. B. 141.

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the expense so heavy as to be utterly out of proportion to the insignificant sum involved in the action, which was a sum of £50 for damages for misrepresentation. It is sufficient to refer to these facts to indicate the extent of their dissimilarity from the facts in the present case. But some observations of the learned President are, I think, in point. He says that the difficulties which arise in the exercise of the power of the Court to stop actions do not appear to be so much difficulties in stating the law as difficulties in administering or applying it, that is, applying it to the facts of the case. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought—to which injustice he would not be subjected if the action was brought in another accessible and competent Court. He says later on that it seemed to him clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant, and be vexatious. This would probably not be so if the difference of trying in one Court rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying it in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses and keeping them during a long trial, and having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appeared to him that a case of vexation, in some circumstances, may be made out if the plaintiff chooses to sue in that country rather than that in which all the witnesses and material for the trial are.

Now, I cannot see that any of these circumstances exist in the present case. The only evidence I have before me of any suggestion of greater expense of a trial in this country than in London is the statement contained in paragraph 11 of the

affidavit of Mr. Cunningham, filed 12th February, 1920, in which he says: "If a trial of this action were to take place in Dublin, it would be necessary for the defendant company to call a large body of witnesses on their behalf, including their artists, all of whom reside in England. The expense to the defendant of a trial in Ireland would be very great." There is no indication given of the nature of the evidence which the large body of witnesses referred to can give, so as to enable me to form an opinion as to whether such evidence would be relevant. In plaintiff's replying affidavit of 20th February he submits that, having regard to the questions to be decided in the action, it will not be necessary for the defendants to call a large number of witnesses, or to go to any considerable expense, as suggested in this affidavit of Mr. Cunningham; and when Mr. Cunningham, in his further affidavit, sworn on the 23rd February, comes to deal with this point, he contents himself with saying that there is no ground for the submission, and says he repeats the statement in his former affidavit, but refrains again from giving any indication of the nature of the evidence of these witnesses. Mr. Brown contends that the evidence of the artists, as to their objects and intentions in designing the representations complained of, would not be material or relevant; but assuming it to be material or relevant, and that the trial of the action in Ireland would cause some extra expense to the defendants, that fact would not, in my opinion, be sufficient to deprive the plaintiff of his rights to have the jurisdiction of the Court under the order in question exercised in his favour.

It has been laid down that when a Court is taking into consideration the question of expense it must have regard not only to the expense of the defendant, but to the expense of all the parties to the suit, including the plaintiff; and in the present case I am not satisfied that it would not be more expensive for the plaintiff to attend in London, with his necessary witnesses, than for the defendants' necessary witnesses to attend in Dublin. As far as I can see, there is no question here of masses of books, documents, and papers to be produced at the trial. It is not alleged in Mr. Cunningham's affidavit that any such necessity would arise. There is certainly no question of dealing with law

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foreign to the tribunal. I am not of opinion that this action is vexatious or oppressive, or that in fact the action is not brought bona fide in this country. The plaintiff alleges, and I think with some show of reason, that it is the publication of the matters complained of in this country, and not elsewhere, that forms the real grounds for his grievance.

In *Watson & Sons v. The Daily Record* (1), of Glasgow, the plaintiffs claimed damages for alleged libels in a newspaper belonging to the defendants, and also an injunction against repetition of the alleged libels within the jurisdiction. The defendants disclaimed any intention of repeating the alleged libel in their newspaper, but intended to justify it at the trial. It was held that although by their claim of an injunction against a repetition of the alleged libels within the jurisdiction, and on the assumption that that claim was made bona fide, the plaintiffs had technically brought the case within the provisions of the English Order and rule, nevertheless, in the exercise of its judicial discretion, the Court ought to refuse leave to issue a writ for service out of the jurisdiction, there being in the circumstances no reasonable probability that the plaintiffs would obtain an injunction at the trial of the action. Lord Justice Cozens-Hardy pointed out that the action being for libel, an interlocutory injunction could not reasonably be applied for, and he referred to *Bonnar v. Perryman* (2), and that therefore nothing could be done until after a verdict at the trial in favour of the plaintiffs, and that the trial could not take place at the earliest before June or July, the judgment being given in February, and he said it was not reasonable to suggest that after a verdict the libels would be reprinted or repeated; that the circulation of the defendants' paper was for all practical purposes confined to Scotland, and he pointed out that there was no reported instance in which an injunction had been granted against a newspaper, or even seriously applied for, after a verdict, the reason, of course, being that once the matter was decided to be libellous, the newspapers were not likely to repeat the offence. I do not, with great respect, think that this authority has any bearing upon the present case.

This action is brought to restrain the publication of the

(1) [1907] 1 K. B. D. 853.

(2) [1891] 2 Ch. 269.

matters complained of in the place where such publications are alleged to affect the plaintiff, and, as I have pointed out, so far as I can see, the defendants claim a right to publish the matters complained of. In *Watson's Case* (1) only a few casual copies of the newspaper were sold in England, and were sent to certain railway stations as being the nearest stopping-places to the Scottish border, and apparently for the convenience of Scottish passengers travelling from England into Scotland.

In the present case what the plaintiff complains of is the extensive circulation in newspapers and magazines and by placards on the hoardings of Dublin; and here I would like to refer to an argument put forward by Mr. Healy. He says that the injunction should be applied for in the place from which these publications are issued, namely, in London, and that if the injunction is granted in this country—I, the remedy will not be effective, because the axe will not be laid to the root of the trouble; and 2, that newspaper agents in this country may be put in peril by selling papers and magazines in this country containing advertisements of the matter complained of. The answer to the first of these contentions is that the plaintiff's real grievance is the publication in this country, where he is known and where the publication tends to make him appear ridiculous in the eyes of his friends and acquaintances; and it appears to me that if it were established in this country that these publications were defamatory of the plaintiff, it would be the duty of the defendants to take care that they did not continue these publications in this country, because upon that assumption they would be repeating the publication of the defamatory matter and disregarding the injunction, and I think the argument leads one to this conclusion. Supposing this action were tried in London, and an injunction granted, such injunction could only affect publication in England, and it would follow, giving effect to Mr. Healy's argument, that there would be nothing to prevent the defendants from publishing the matters complained of in Ireland, which is the very thing the plaintiff seeks to prevent; but I do not think I ought to assume that if an injunction were granted in this country the defendants would continue to publish the matters complained of at all.

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Mr. Healy has laid great stress upon the amount of money which is being spent in producing the figures complained of by way of advertisement for their business; but if these advertisements are decided by a Court of competent jurisdiction to be defamatory, surely the plaintiff cannot be denied his rights to have the publication stopped because financial loss may result to the defendants.

I would gather from the correspondence disclosed on this motion and read by Mr. Healy that on a previous occasion the intervention of Mr. Harvey Du Cros upon a complaint of the plaintiff resulted in advertisements then published or contemplated, and of which the plaintiff complained, being withdrawn. I do not base my decision in any way upon this fact, because all the facts and circumstances connected with the matter are not fully before me, but I think it indicates that the defendants would not continue the publication of matters that were held to be defamatory. Of course if, upon the trial, it were shown that the plaintiff had acquiesced in the publication of these advertisements, and by his acquiescence was responsible for the incurring of great expense by the defendants, it is quite possible that the plaintiff might be held to be disentitled to the relief sought; but, as I have pointed out, that is a matter which, in my opinion, I am not entitled to decide in favour of the defendants on the present occasion.

Egbert v. Short (1), relied upon by Mr. Healy, is not, in my opinion, in point in the present case. There the alleged cause of action arose in India, and the liability of the defendants would have to be determined according to the law of India, and upon the evidence of Indian witnesses, and it was held that the proper place for the action to be brought was India; that the action was not brought bona fide in England; that the injustice to the defendant in bringing the action in England was so great that the Court would not allow the action to proceed, and that the fact that the plaintiff happened to be in England at the date of the issue of the writ, although not an ordinary resident in England, was not in itself sufficient to preclude the Court from dismissing the action. I do not think the facts in the present case in any sense bring it within that authority.

In *Tottenham v. Barry* (2) Vice-Chancellor Hall held upon

(1) [1907] 2 Ch. 205.

(2) 12 Ch. D. 797.

the true construction of the rules of 1875, Order 11, rules 1 and 1a, in England, that the statement in the affidavit of the intended plaintiff as to the comparative cost and convenience of the proceedings in England or in the place of the defendant's residence was not in reality a compliance with the requirements of the rule; that both the plaintiff and the defendant were residing in Ireland, and that both of them were likely to remain there, and that the plaintiff was only visiting in London for a short time during the season; that an investigation as to the plaintiff's claim—which arose out of a partnership for the construction of a railway in Ireland—could be best held in Ireland, where the parties resided, and where the books of account were kept; that there would be great inconvenience in taking these accounts in England, instead of in Ireland; that the order which he was asked to set aside was improperly applied for, and that the information before the Court was not sufficient. I cannot see that that decision affects the present case at all.

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I have now, I think, dealt with practically all the authorities, including those cited by Mr. Healy, and the following are the conclusions which I have arrived at after a careful consideration of all the facts and circumstances placed before me, and all the arguments put forward and authorities cited by counsel, and other authorities referred to by me:—

I think that this Court has jurisdiction to hear and determine the action as framed. I think it would be impossible for me to decide now that the publications complained of are incapable of being held to be defamatory of the plaintiff. I think I ought not to hold that the intended defendants have established at this stage the defence of acquiescence, but that this defence is a matter to be decided at the trial. I think that in the event of the plaintiff succeeding in this action he can enforce the remedy within the jurisdiction. I think it has not been established that the action is vexatious or oppressive. I think that, taking into account the rights of the plaintiff as well as the defendants, the balance of convenience has not been shown to be in favour of the trial of action being had in England.

I do not think that I have any evidence before me to suggest that any greater number of witnesses, who can give relevant

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evidence, will be required by the defendants than by the plaintiff, or that the trial of the action here would be more expensive than the trial of the action in London, or that there is any special inconvenience to the defendants in the trial being had in this country.

Having arrived at these conclusions upon the best consideration that I have been able to give to the case, I must hold that the case comes within the terms of Order 11, rule 1, and that I must decline to discharge the order of the 16th January, and that I must decline to set aside the writ, and the service of the writ and subsequent proceedings, and I must dismiss the defendants' motion with costs.

Solicitor for the plaintiff: *F. G. Sharpe.*

Solicitors for the defendants: *Neilson, Son, & Dawson.*

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 April 28.
 July 2, 23.

Statute of Limitations—Real Property Limitation Act, 1833 (3 & 4 Wm. 4, c. 27), s. 42—Annuity charged on land—Arrears—Irish Land Act, 1903 (3 Ed. 7, c. 37)—Sale by tenant for life—Trustees for the purposes of the Settled Land Acts.

By indenture of settlement, dated 15th May, 1880, lands were conveyed, subject to certain rent-charges and incumbrances then existing thereon, to trustees to the use, inter alia, that R. H. E. and E. M. E. should receive annual rent-charges of £75 each, which were thereby charged on the said lands, and a term of 500 years was limited to the trustees to secure the said annuities. Subject to the said annuities, the lands were limited to the use of R. E. for life, with remainder to his first and other sons in tail. L. E. was entitled in priority to the settlement to two annual rent-charges of £300 and £200 respectively. From May, 1903, the income of the lands was insufficient to pay the said prior rent-charges in full. In 1905 R. E. agreed to sell portion of the lands to the tenants thereof under the Irish Land Act, 1903. On 20th March, 1911, the purchase-money was lodged in the Bank of Ireland, and an order made attaching claims thereto. In the schedule of incumbrances lodged in the matter of the said sale, R. H. E. and E. M. E. appeared as claimants in respect of the arrears of their annuities, and on 25th August, 1905, were each paid on account a portion of the sum due for such arrears. The residue of the purchase-money was vouched payable to the trustees as trustees for the purposes of the Settled Land Acts, and was retained in Court to meet the rent-charges payable to L. E. L. E. died in 1919, and the investments representing the residue of the purchase-money were transferred to the trustees. On summons by the trustees to determine the amount payable in respect of the arrears of the annuities:

The sales having been carried out under the Settled Land Act, 1882, and the purchase-money being capital money under that Act, and to be treated as land: *Held*, that only six years' arrears of the annuities were recoverable against the trust estate.

ORIGINATING SUMMONS.

By indenture of settlement, dated 15th May, 1880, Thomas Ellis and Richard Ellis, in pursuance of a power in a former

Powell J. indenture of the 14th May, 1880, granted and appointed, subject
1920. to the incumbrances and rent-charges therein mentioned, to two
RYOTT trustees the lands therein mentioned, to the use that one Richard
v. Ellis should, during the joint lives of himself and his father,
BENTLEY. receive a yearly rent-charge of £100; and that Richard Henry
Whately Ellis and the defendant Elizabeth Mary Bentley,
then Elizabeth Mary Ellis, should each receive during their
respective lives a rent-charge of £75; and that one Sarah
Ellis should receive a yearly rent-charge of £150, the rent-charges
to be charged upon the hereditaments, and to be payable as
therein mentioned.

This indenture of settlement contained powers of distress and entry for enforcing payment of the rent-charges, and a term of 500 years was thereby limited to the trustees for the purpose of raising them, and subject thereto the hereditaments were limited to the use of Thomas Ellis for life, with remainder to the use of Richard Ellis for life, with remainder to the first and other sons of Richard Ellis successively in tail male, with remainder over.

The annuity of £100 payable to Richard Ellis determined on his death on the 12th June, 1888; the annuity of £150 payable to Sarah Ellis determined on her death on the 20th September, 1884, and the summons was conversant only with the two annuities of £75 payable to Richard Henry and Elizabeth.

The settlor Richard Ellis died on the 22nd January, 1908, whereupon his eldest son, Thomas Ellis, one of the defendants, became entitled, under the provisions of the principal indenture, to an estate tail in the hereditaments, or in such of them as remained unsold.

Richard Henry Ellis died on the 8th January, 1916, whereupon his annuity of £75 determined.

Louisa Jane Ellis, the widow of Thomas Ellis, was entitled to two jointure rent-charges of £300 and £200, which had priority to the annuities. The said two annuities of £75 each were paid to the annuitants up to the year 1901; the last payment on foot of them, save a payment out of Court referred to later, was made on the 20th May, 1903. From that date the income accruing from the trust estate was insufficient to meet the two jointure rent-charges of £300 and £200 payable to Mrs. Louisa Jane Ellis,

which had priority to the annuities; she died on the 20th February, 1919.

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In the year 1905 agreements were entered into for the sale of portion of the hereditaments in question in the County of Limerick to the occupying tenants under the Irish Land Act of 1903. The lands were declared an estate by order of the Estates Commissioners dated 16th March, 1911, and on the 20th March, 1911, the purchase-moneys of the lands so sold were lodged in the Bank of Ireland to the credit of the matter, and an order was made on that date attaching claims to the purchase-money. The final schedule of incumbrances was ruled by Mr. Justice Wylie on the 15th May, 1911, and at item "A" in the schedule the names of Richard Henry and Elizabeth appear as claimants under sect. 24, sub-s. 8, of the Land Act of 1903, in respect of arrears of their annuities, and the sum of £320 12s. 6d. due on the 25th August, 1905, was vouched payable to each of them, and each of them was paid the sum of £249 17s. 9d. on account of the arrears; at item No. 13 on the final schedule the residue of the purchase-money was vouched payable to the plaintiffs, as trustees of the settlement of the 15th May, 1880, for the purpose of the Settled Land Acts. The residue was retained in Court during the lifetime of Louisa Jane Ellis to meet the jointure rent-charges payable to her. The two annuities of £75 each did not appear in the schedule as incumbrances affecting the lands sold.

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In the year 1912 agreements were entered into for the sale of further portions of the hereditaments in question, namely, certain lands in the County of Cavan, to the occupying tenants thereof under the Land Act of 1909. On the 5th February, 1914, a sum of £1836 Guaranteed Land Stock was advanced in the matter, and an order made attaching claims, and on the 17th July, 1912, a further advance of £819 was made, and a sum of £563 was lodged by the purchasing tenants, and the usual order attaching claims was made on that date; at item No. 9 of the final schedule the residue of the purchase-money was vouched payable to the plaintiffs, as trustees for the purposes of the Settled Land Acts, of the settlement of the 15th May, 1880. The residue in this case was also retained in Court to meet the jointure rent-charges of Louisa Jane Ellis during her life, the claim to which appears at item 4

Powell J. in the schedule. The annuities of £75 in question did not appear
1920. in the schedule as incumbrances affecting the lands.

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BENTLEY. On the death of Louisa Jane Ellis on the 20th February, 1919, the residue of all the purchase-moneys became payable to the plaintiffs as trustees of the principal indenture, all prior charges and incumbrances having been paid off, and on the 28th August, 1919, the sum of £349 Canadian Pacific Railway Co.'s Stock, representing the residue of the purchase-moneys of the lands in the County Limerick, and a sum of £533 War Loan Stock, representing the residue of the purchase-moneys of the lands in the County Cavan, were transferred to the plaintiffs as such trustees.

The hereditaments remaining unsold and subject to the trusts of the principal indenture consist of the village of Abbeyfeale in the County of Limerick, and certain town parks in the County of Cavan, the net annual income of which amounts to the sum of in or about £500, to which, subject to the annuities and the arrears thereof, one Thomas Ellis is now entitled as tenant in tail in possession under the provisions of the principal indenture.

It will be found by an examination of the official documents in the Land Commission that, as regards the lands in the County of Limerick, Richard Ellis, a person of unsound mind, was vendor, by the committee of his estate, and in the originating application he is described as tenant for life under the settlement of the 15th May, 1880; and that, as regards the lands in the County of Cavan, Thomas Ellis, a minor, by the trustees of the settlement of the 15th May, 1880, was the vendor, and this Thomas Ellis is described as tenant in tail in possession. The sales were carried out under the Settled Land Acts, and the schedule of incumbrances would not, under the Land Commission practice, make any reference to the annuities in question as incumbrances, but only to incumbrances having priority to the settlement, the purchase-money, after payment of prior charges, being payable to the trustees.

As regards the lands in Limerick, there were at the date of the agreement for sale apparently arrears of rent due, and a sum equal to these arrears was, under sect. 24, sub-s. 8, of the Irish Land Act of 1903, payable out of the purchase-money of the estate to

the person who would have been entitled to receive those arrears for his own use, namely, the lunatic, Richard Ellis ; but in ascertaining the amount payable in respect of such claim to him, according to the course of Mr. Justice Wylie's Court, as laid down by him in *Ashbrook's Estate* (1), there would have to be deducted from the sum added for arrears of rent all unpaid outgoings which would have been properly payable out of those arrears by the person entitled to receive them, "because it is only the net balance so arrived at that such person would have been entitled to receive for his own use." Thus, the arrears due on the annuities appear on the schedule incidentally as an outgoing payable out of the sum payable to the vendor under sect. 24, sub-s. 8, of the Act of 1903. In the case of the Cavan estate apparently there were no arrears of rent added to the purchase-money, and therefore there was no question of any outgoings to be met out of the sum, and thus the arrears of the annuities are not provided for on that schedule.

The trustees having been called upon by Elizabeth Bentley and by the personal representatives of Richard Henry Ellis to raise and pay the annuities and arrears, brought this summons to determine what arrears were payable.

Chadwick, for the trustees.

Carrigan K.C. and *Kennedy K.C.* and *J. M. FitzGerald*, for the defendant Elizabeth Mary Bentley, the surviving annuitant:—

The first effective use under the settlement is the use to the trustees for the term of 500 years to secure the annuities in question, and they are trustees first of that term. When the residue of the purchase-money was vouched payable to the trustees, it was retained in Court for everybody entitled to it, and when it was paid out to the trustees it was primarily applicable to the payment of the annuities. The money is held by the trustees on an express trust, and no statute of limitations applies. If it had not happened that the trustees of the term were also the trustees of the settlement, the purchase-money could not have been paid to them, but must have been retained, save in so far as it applied to arrears, in order to answer the annuities, in the same way as it was retained to meet the jointure

(1) [1909] 1 I. R. 157.

Powell J. charges. In any case, Elizabeth Bentley is entitled to six years' arrears, up to 20th March, 1911, when the purchase-money was lodged, and to all arrears since that date: *Blennerhassett's Estate* (1).

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BENTLEY. Until the death of the jointress there was no surplus, and therefore no adverse possession.

[They referred to *In re Belton's Estate* (2); *In re Swanton's Estate* (3); *In re Smithwick's Estate* (4); *In re Morrison's Estate* (5).]

Garrett Walker K.C., for the defendant Thomas Ellis, the tenant in tail:—

The sales were carried out under the Settled Land Acts, under which the vendors had power to convey the lands for the estate or interest, the subject of the settlement, discharged from all estates, interests, and charges subsisting thereunder, and the purchase-money is capital money arising under the Settled Land Acts, and is to be considered as land: Settled Land Act, 1882, sect. 20, sub-ss. 1 and 2; sect. 22, sub-s. 5. The claims of the annuitants could not have been ascertained in the Land Purchase matters. In *Blennerhassett's Estate* (1) the particular claims in question were on the schedule of incumbrances, and the sale was not a sale under the Settled Land Acts. The sole ground for the contention of the surviving annuitant is the accidental fact that the trustees for the purposes of the Settled Land Acts are also trustees of the term created to secure the annuities.

[He referred to *Huddleston's Estate* (6); *In re Turner, Klaffenberger v. Groombridge* (7).]

POWELL J. [His Lordship, having stated the facts as above, proceeded]:—

I think it is plain that as these sales were carried out under the Settled Land Act, 1882, the purchase-money is capital money

(1) [1911] 1 I. R. 16.

(2) [1894] 1 I. R. 537.

(3) [1898] 1 I. R. 157.

(4) [1896] 2 I. R. 401.

(5) [1907] 1 I. R. 15.

(6) [1920] 1 I. R. 29.

(7) [1917] 1 Ch. 422.

arising under the Act. Sect. 22 of the Act applies, and for the purposes with which I am dealing it is to be treated as land. Powell J.
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The section which governs the question which I have to determine therefore, namely, as to how many years' arrears of the annuities are now recoverable, appears to me to be sect. 42 of the Real Property Limitation Act, 1833; and under sect. 10 of the Real Property Limitation Act, 1874, an express trust makes no difference as regards arrears in its application to the operation of this section; and, save for the proviso at the end of s. 42, only six years' arrears can be recovered. RECT
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In *In re Turner, Klastenberger v. Groombridge* (1) one Thomas Turner, who died in 1863, by his will appointed two persons to be executors and trustees thereof, and devised and bequeathed to them his real and personal estate upon trust for sale and conversion, and out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and legacies, and to invest the residue of the moneys, and by and out of the interest, dividends, and annual produce of the investments to pay the clear annual sum of £700 to his wife Eleanor Turner, during her life, and declared that, subject and without prejudice to the payment of this annual sum, so long as it should continue payable, his trustees should stand possessed of the trust moneys, stocks, funds, securities, &c., and annual produce, in trust for all his children living at his death who should attain the age of twenty-one years, in equal shares. And the trustees were empowered to postpone the sale and conversion of his real and personal estate, and any part thereof, for such period as to them should seem expedient; and the testator directed that until such sale and conversion the rents, interest, dividends, and annual produce of the same should be paid to or applied for the person or persons, and for the purposes for which the interest, dividends, and annual produce of the moneys to arise from the sale and conversion would be payable or applicable under the trusts of his will.

On the hearing of the summons the Court held, on the construction of the will, that the annuity was a charge on the corpus of the testator's real and personal estate, and directed an account

(1) [1917] 1 Ch. 422.

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of the arrears. The question was then raised whether the arrears were to be limited to six years before the death of the annuitant, and the matter stood over for further argument on that point, and also on another point as to acknowledgment. Counsel for the executor of the annuitant submitted that no statute of limitations applied, and that the estate of the annuitant was entitled to be paid all the arrears of the annuity; that there was an express trust, and that the annuity was charged on the corpus of the estate, and was a continuing charge; that the trustees had fully performed their duty by paying the whole income to the annuitant during her life, and now came to the Court to know to whom they were to pay the trust funds; that they were still in possession of the trust estate, and were administering it, and that there had not been any adverse possession or enjoyment by anyone, and that they could not set up the statute, and that the statute had no application where the claim for arrears was against trustees, and not against anyone in adverse possession; that sect. 42 of the Act of 1833 did not refer to a trust; that sect. 10 of the Act of 1874 had no bearing in cases where trustees were in possession of land, or the rents and profits of land, but only where trustees are put forward to enforce a charge on land that is in the possession of some beneficial owner, and that the object of sect. 10 was to protect the beneficial owner in possession, so that his position would not be worse because the claim was put forward by a trustee; that there was nothing in sect. 10 to prevent a cestui que trust from recovering from his trustee his property that he had got. Mr. Justice Neville reviewed the authorities, and said that they showed that if once you find that an annuity is charged upon land, all remedies, whether against the land or personal estate, are subject to the same limitations, and he held that by virtue of sect. 42 of the Act of 1833, and sect. 10 of the Act of 1874, only six years' arrears of the annuity from the death of the annuitant were recoverable against the trust estate.

If in this case the annuitants or their representatives had brought proceedings for recovery of the arrears of the annuities within a year from the death of Mrs. Louisa Jane Ellis, who died on the 20th February, 1919, it might perhaps have been argued that the case came within the proviso to sect. 42, as it might have

been contended that from the time at which the order of Mr. Justice Wylie was made, retaining the amount of the purchase-money to meet the jointure of Mrs. Louisa Jane Ellis, she was, within the meaning of the proviso, a prior incumbrancer in possession of the land. I am not aware whether this point has ever been decided; but as no action, suit, or other proceeding was taken within a year from the death of Mrs. Louisa Jane Ellis, the question does not arise in the present case.

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I am of opinion that the question which I have to determine is governed by sect. 42 of the Real Property Limitation Act of 1833, and that therefore only six years' arrears are now recoverable by the annuitants.

Solicitors for the trustees: *French & French.*

Solicitor for Elizabeth Bentley: *H. J. Marshall.*

Solicitor for Thomas Ellis: *R. D. English.*

M. G. E.

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June 17, 18,
29.

JOHN S. HALLEY *v.* THOMAS O'BRIEN AND
FRANCIS WOODS (1).
(1919. No. 152.)

*Administration — Decree — Sale by executor without leave of the Court —
Ratification — Sale — Memorandum — Signature of party to be charged —
Sufficiency — Statute of Frauds, 7 Wm. 3 (Ir.), c. 12, s. 2.*

A testatrix by her will appointed two executors, and, having bequeathed certain pecuniary legacies, devised and bequeathed the residue of her estate to one of her executors absolutely. One of the legacies being unpaid, the legatee brought a suit for the administration of the estate of the testatrix, and a decree for administration was made. The remaining legacies, and the debts and funeral and testamentary expenses of the testatrix had already been paid. After the decree the executors, without obtaining the sanction of the Court, sold to the plaintiff by public auction certain leaseholds, portion of the estate. The conditions of sale stipulated that the sale was to be subject to the approval of the Court. The executors subsequently refused to complete. In an action for specific performance brought by the plaintiff: *Held*, by the Court of Appeal (affirming the decision of Powell J.), that the sanction of the Judge to the sale given at the trial was sufficient, and that the plaintiff was entitled to a decree.

The solicitor for the executors prepared a memorandum of the agreement for sale of the leaseholds, in the body of which the names of the vendors appeared, and he wrote at the end of the memorandum the words, "I confirm above sale on behalf of the vendors," with the intention that the document, which was signed by the plaintiff, should be signed by the auctioneer on behalf of the vendors, but the memorandum was never signed by the auctioneer or by either of the vendors.

Held, by the Court of Appeal (affirming the decision of Powell J. (*ante*, p. 149)), that the document constituted a sufficient compliance with the Statute of Frauds, sect. 4.

This was an appeal by the defendant, Thomas O'Brien, from the decree of Powell J., dated March 30th, 1920 (reported *supra*, page 149), where the facts are stated.

Norwood K.C. and *W. G. Gibson K.C.* (*Connolly* with them), for the appellant:—

We contend that the executors had no power of sale without the sanction of the Court, and no such consent was obtained:

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Williams on Executors, 10th ed., 710 ; Daniel's Chancery Practice, 8th ed., 931 ; *Neeves v. Burrage* (1) ; *Annesley v. Ashurst* (2). We say, further, that the memorandum does not satisfy the requirements of the Statute of Frauds. No doubt the names of the vendors appear therein, but it is not "signed" by the vendors, within the meaning of the statute, so as to authenticate and bind the contract. In *Caton v. Caton* (3) Lord Chelmsford said : "The cases upon this point cited in the course of the argument establish that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument,' or 'so as to govern the whole agreement,' to use the words of Sir William Grant in the case of *Ogilvie v. Foljambe* (4), or, in the language of Mr. Justice Coleridge in *Lobb v. Stanley* (5), 'so as to govern what follows.' " And he adds : "The name of the party and its application to the whole of the instrument can alone satisfy the requisites of a signature." *Evans v. Hoare* (6) shows that it may be immaterial whether the signature "appears in the body of the memorandum, or at the beginning, or at the end," but it must be intended as a signature to bind the contract. Here it appears from the memorandum itself that the intention was to have it signed by the auctioneer. In *Stokes v. Moore* (7) the written note in question was held not to be a sufficient memorandum within the Statute of Frauds, although the name of the party sought to be charged appeared written in the body of the document. Skynner C.B. there said : "The meaning of the statute is that it should amount to an acknowledgment by the party that it is his agreement, and if the name does not give such authenticity to the instrument, it does not amount to what the statute requires" (p. 222). In *Hubert v. Treherne* (8) articles of agreement, purporting to be made between the persons whose names were stated at the commencement of the articles, concluded with the words, "as witness our hands," but were not subscribed by any of the parties, and it was held that there was no agreement binding

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(1) 14 Q. B. 504.

(2) 3 P. Wms. 282.

(3) L. R. 2 H. L. 127.

(4) 3 Mer. 63.

(5) 5 Q. B. 574.

(6) [1892] 1 Q. B. 593.

(7) 1 Cox. Ch. Cas. 219.

(8) 3 M. & G. 743.

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within the Statute of Frauds. Tindal C.J. said (p. 753): "I am not satisfied that there is in this case any signature at all. The names of the parties necessarily appear in the body of the instrument, which would not otherwise be intelligible. To hold that the mere introduction of the names of the parties was sufficient would be almost to repeal the statute." In *Munday v. Asprey* (1) Fry J. held that a letter from an alleged purchaser, enclosing and referring to a draft conveyance in which it was recited that he had agreed to purchase land, did not, together with the draft, constitute a memorandum of the contract satisfying the Statute of Frauds: *Dyas v. Stafford* (2); *Bill v. Bament* (3); *Hucklesby v. Hooks* (4).

Battersby K.C., Clancy K.C., and Jas. Kenny, for the respondent:—

The executors were entitled to sell notwithstanding the administration decree: *In re Mansel Rhodes v. Jenkins* (5); *Berry v. Gibbons* (6); *Price v. Price* (7); *Neeves v. Burrage* (8); *Loneragan v. Hoban* (9). We further contend that the ratification and adoption of the sale by the learned Judge was sufficient, although no consent had been obtained at the time of the contract of sale. A necessary ratification of an assignment need not be contemporaneous with the assignment: *Tobin v. Cleary* (10); *Lessee of Davis v. Davis* (11); *Scott v. Redmond* (12). The consent of the Judge to the sale was never sought for by the executors, and it does not lie in their mouths to rely on the absence of consent. As to the Statute of Frauds, we contend that the memorandum is sufficient. It contains all the essential elements of the contract, including the names of the vendors, which were inserted by their duly authorized agent, and which authenticate the entire instrument, within the meaning of Lord Chelmsford's judgment in *Caton v. Caton* (13). It is immaterial in what part of the document the signature appears: *Evans v. Hoare* (14);

(1) 13 Ch. D. 855.

(2) 7 L. R. Ir. 590.

(3) 9 M. & W. 36.

(4) [1900] W.N. 45; 82 L.T. 117.

(5) 33 W. R. 727.

(6) L. R. 8 Ch. 747.

(7) 35 Ch. D. 297.

(8) 14 Q. B. 504, 511.

(9) [1896] 1 I. R. 401.

(10) I. R. 7 C. L., at p. 22.

(11) 4 I. L. R. 353.

(12) 8 L. R. Ir. 112.

(13) L. R. 2 H. L. 127.

(14) [1892] 1 Q. B. 593.

Schneider v. Norris (1); *Torret v. Cripps* (2); *Ogilvie v. Foljambe* (3). *Appeal.*
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[The following cases were also cited and discussed:—*Coles v. Irecothich* (4); *Wallace v. Roe* (5); *Day v. Singleton* (6); and *Williams v. Brisco* (7).] HALL v.
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Sealy K.C. (*Kinahan* with him), for the defendant Francis Woods, said that his client had always been ready and willing to carry out the sale, and would abide by the order of the Court.

Norwood K.C., in reply.

Cur. adv. vult.

SIR J. CAMPBELL C., having stated the facts, said that as to the point raised under the Statute of Frauds he entirely adopted the conclusion of Powell J., and accepted his reasons for that conclusion. As to the contention that the contract for sale was conditional on the consent of the Court being obtained, and that such consent had not been obtained, he was of opinion that there was no substance in this objection, as the consent of Powell J. was given at the trial. The appeal should be dismissed.

June 29.

RONAN L.J.:—

Sir W. Anson, in his analysis of contract, says that "contract is formed by the acceptance of an offer" (*Law of Contract*, 14th ed., p. 29). Sir F. Pollock says: "It is possible, however, to analyse and define agreement as constituted in every case by the acceptance of a proposal. In fact, this is done in the Indian Contract Act; and it is appropriate to most of the contracts in daily life, buying and selling, etc." (*Principles of Contract*, 8th ed., p. 6). He adds an illustration from the Roman Law, and says: "Yet the importance of proposal and acceptance as elements of contract has, until late years, been much more distinctly brought out in the Common Law than by writers on the modern civil law." The application of this principle to contracts by correspondence is familiar to us all. A writes to B: "Will you buy my lands of X for £1,000?" The next day B writes at foot of

(1) 2 M. & S. 286.

(2) 27 W. R. 706.

(3) 3 Mer. 53.

(4) 9 Ves. 234.

(5) [1903] 1 I. R. 32.

(6) [1899] 2 Ch. 320.

(7) 22 Ch. D. 441.

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the letter "Yes, B," and returns it to A. I should have thought it clear—1, that A's letter was an offer only; 2, that the addition by B converted the transaction into a contract; 3, that it was a valid memorandum as required by the Statute of Frauds signed by both parties. But it is plain there was no contract when A signed. If this prevents the signed offer and acceptance being a valid signed contract under the statute, I fail to see how a contract for the sale of lands or goods made by correspondence can ever be proved so as to satisfy the statute. The contract only arises where one party unconditionally accepts the terms of the other. The letter doing this may be called the final letter. If this is from A to B, prior to it there is no contract. It is only signed by A, consequently any signature of B relied on must be of a date when there is no contract. If this renders B's previous signature insufficient, it seems to me to go to the root of the whole principle of offer and acceptance when applied to the Statute of Frauds.

I have not found any case in which it was suggested that where there is a clear contract for the sale of land proved by correspondence, duly signed between the parties, it can only be enforced against the writer of the final letter, and cannot be enforced by him. In *Munday v. Asprey* (1), a case in which he was dealing, not with a correspondence, but with one letter alone, Fry J. held that this letter was not sufficient. At the close of his judgment he says: "The statute requires that a concluded agreement existing at the time when the memorandum is signed, should be proved by the plaintiff, whereas the document, as I have said, shows no actual existing agreement." The letter enclosed the engrossment of a conveyance; but Fry J. held that the two together did not show an existing agreement at any time. At p. 258 of the fifth edition of Fry on Specific Performance (not by the Lord Justice), there is this statement: "There is, of course, no binding contract when the writing appears only to be terms agreed on as a basis for a contract, and not the contract itself, . . . or where one of the parties was at the time when the memorandum was signed—which is the point of time at which the statute requires the plaintiff to prove a concluded contract existing, (6)—incapable of contracting bindingly." 6 refers to *Munday v. Asprey* (1)

as the authority for the proposition in the parenthesis. It is obvious that, if this proposition was generally true, it would entirely upset the law as to proposal and acceptance as stated at pp. 150, 151 of the same edition: "Where there is a writing under the hand of the defendant expressing the contract, there is no need to prove an acceptance in writing by the plaintiff, and the institution of the action is a sufficient acceptance. . . . But the cases have gone further, and it is now well settled that where the writing is a memorandum expressing not a contract but a mere proposal, yet there the acceptance of this proposal (though it seems essential to convert the proposal into a contract) need not be in writing" (p. 150). That is, the defendant's signature to a mere proposal is sufficient to bind him under the statute if that proposal is subsequently accepted by plaintiff, even though not in writing. This applies a fortiori where it is in writing signed by plaintiff. On p. 151 the authorities are referred to, and are conclusive: see Benjamin on Sales, 4th ed., p. 229. I am satisfied that in *Munday v. Asprey* (1) Fry J. never intended to lay down any such proposition as is suggested.

The whole document when issued by the vendor is an offer to sell by auction, on certain conditions, with the names of his agents. The memorandum, with a blank for the price and the purchaser's name, is part of this offer. What is it on the face of it? Is it a memorandum which, when properly filled up, is intended to be a memorandum of an offer, or of a concluded contract? On the face of it, it is intended to be filled up when the auction is over and the purchaser declared—as what? As the formal statement of the contract between the parties, so as not to have the matter depending on recollection or the notes of the auctioneer. It is represented as a document which will be complete for its purpose when signed by the purchaser. There is no place for, or indication that it requires, any further signature by the vendor or anyone but the purchaser. It incorporates the particulars and conditions. They all form one document issued by the vendors to and for the purpose of inducing people to purchase, and this particular part for the above purpose.

The forms in the text-books, such as Key and Elphinstone, vary materially from that in the present case. Thus, at page 232

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of vol. i, it runs thus: "It is hereby agreed between —, as agents for A and B the vendors, and P (the purchaser), that the said P has become the purchaser. As witness our hands."

In *Hubert v. Treherne* (1) the case turned on these words.

The document there on the final words began: "Articles of agreement . . . between T. H. (plaintiff) and A, B, and C, trustees and directors of the X company," and concluded "as witness our hands." The Court held that these words showed that "it was not intended that the insertion of the names in the body of the instrument should operate by way of signature (per Tindal C. J.). The judgment of Coltman J. is to the same effect, but he adds: "It is not certain that the plaintiff saw the articles; and there was no sufficient evidence of any authority to give out the copy on behalf of the directors." Erskine J. says: "We cannot help seeing that it was intended that the signature of the parties should be added. I am not, however, prepared to say that if it had been shown that there was authority to give out the fair copy of the articles, the names inserted at the beginning would not have been sufficient," that is, notwithstanding the intention shown by the witnessing clause. ". . . It was not shown that the secretary had any authority from the directors to transmit the fair copy to the plaintiff; there was therefore no evidence of an agreement in writing signed by the party to be charged or by some other person by him thereunto lawfully authorized." Maule J. says: "If a party writes 'I, A B, agree with C D,' &c., with no such conclusion as is found here 'as witness our hands,' it may be that this is a sufficient signature, within the statute, to bind A B. So where the seller's name appears in a bill of parcels which he fills up and delivers out as a complete and perfect contract; or where a party authorized so to do issues an instrument containing the printed name of the principal." I cannot find that this case was ever questioned. In the present case the document was issued by the defendant beyond all doubt. It showed on the face of it a contract for sale between the parties. Further, so far from indicating that it was intended to be signed by the vendor, the contrary intention plainly appears.

The judgments in the case appear to me conclusive as to the present case. The defendant intended the document to be operative when signed by the plaintiff purchaser. As what? As a contract or as an offer? If it was only enforceable at the option of the defendant, it was in substance identical in effect with the document in *Dyas v. Stafford* (1), yet the plaintiff was induced to believe that he was thereby getting a binding contract. If this was the effect, the words on which the Court of Appeal decided *Dyas v. Stafford* (1) were really inoperative, except that they gave the plaintiff full notice that the document was only an offer.

The suggestion that the final document to be signed by the vendor after the auction when his bid had been accepted was "issued," "offered," or "held out" as a document to operate only as an offer by him to buy at the price already accepted seems to me to be absurd, and further I think that it would have been a direct fraud on the part of all concerned if the plaintiff was induced to sign a document such as the present, when it was obvious to all he must have believed he was signing the final formal contract between him and the defendant.

O'CONNOR L.J. :—

This case raises an interesting and important question under the Statute of Frauds. The defendants, as executors of deceased, put up for sale by public auction, on the 21st December, 1918, a certain farm. The plaintiff attended the sale, was declared the highest bidder and purchaser of the farm for £665, and signed the contract for purchase. The particulars and conditions of sale, which were typewritten, described the farm as "sold" by public auction for Thomas O'Brien and Francis Woods, both of Irishtown, Clonmel, executors of Mary O'Brien, deceased. At the end of the particulars and conditions of sale there was a "Memorandum," also typewritten, in the following terms: "I . . . do hereby acknowledge myself the purchaser from Thomas O'Brien and Francis Woods, the vendors of the property," &c. The conditions provided (Condition 1)—"The sale is subject to a reserve price." No reserve price was fixed upon; but when the bidding at the auction reached £600, the auctioneer consulted the defendants,

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and it was agreed that the farm should be sold at that figure if no more was given. The plaintiff bid up to £665, and the farm was then knocked down to him. Thereupon a Mr. Thomas F. O'Brien, the solicitor for the vendors, proceeded to complete the agreement. He did this by writing the purchaser's name and address, the amount of the purchase-money, auction fees and deposit, the date, in the memorandum, and got the purchaser to sign it. He then wrote the words, "I confirm above sale on behalf of the vendors," intending that this should be signed by the auctioneer. Through an oversight, as we were told by the plaintiff's counsel, the auctioneers did not sign this confirmation. The purchaser paid to the auctioneers the sum of £199 10s., being £166 5s. for deposit, and £33 5s. for auction fees. The memorandum, as thus completed, runs as follows:—

"Memorandum—I, John Halley, of Marlfield, do hereby acknowledge myself the purchaser from Thomas O'Brien and Francis Woods, the vendors of the property described in Lot 1 in the particulars of sale, at the sum of £655; and having paid £166 5s. as a deposit, and £33 5s. as auction fees to Stokes and Quirke, I hereby bind myself to complete the purchase agreeably to the within particulars and conditions of sale. Witness my hand this 21st day of December, 1918, John S. Halley (stamp).

Purchase money	...	£665	0	0	
Deposit	...	...	...	£166	5 0
Auction fees	...	...	...	33	5 0
					£199 10 0

I confirm above sale on behalf of vendors."

The defendants having refused to carry out the sale, the plaintiff brought his action for specific performance, to which sect. 2 of the Irish Statute of Frauds, 7 Wm. 3, c. 12, has been pleaded as a defence.

The plaintiff now says that the words in the typewritten memorandum, "Thomas O'Brien and Francis Woods," are a sufficient signature to satisfy the statute. The entire memorandum and the particulars and conditions of sale were prepared by his solicitor, Mr. O'Brien, who acted for the vendors, and, of course, as the solicitor was authorized to prepare the memorandum, the case

stands just the same as if his client had personally prepared them. *Appeal.*
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In considering this question, one has first to rid one's mind of certain wrong and confused impressions that leap to it. When we speak of "signing" or "signature" we usually think of the person's name, signed by himself in the form he generally uses, as a clue to or mark of his identity. That is the meaning of the term when we ask, "Is that Mr. H.'s signature?" Further, we usually associate "signed" and "signature" with a name subscribed or put at the end of a document. But these are not the sole meanings of "signature" at all. One of the meanings, and, for the purpose of this case, the appropriate meaning, is "the name of a person, or something used as representing his name, affixed or appended to a writing or the like, either by himself or his deputy as a verification, authentication, or assent": *Century Dictionary*.

Accordingly the signature may—as has been decided in many cases under this statute—take any one of a great variety of forms. It may be typewritten; commercial contracts are, of course, frequently entered into by means of an offer or acceptance where the names of the persons making the offer or accepting it are typewritten. So also it may be lithographed or printed; there is no greater magic about typewriting than about print; and many cases have been decided in which print was held to be a good signature within the statute: *Schneider v. Morris* (1). Initials will do: *Phillimore v. Barry* (2), *Sweet v. Lee* (3); for why should not one man sign a memorandum of a contract with his initials when a painter can "sign" his picture, or an architect his plans, in that fashion? So also the signature may consist of the name in the third person; "Mr. John Jones accepts the offer" is quite as effectual as "I, John Jones, accept the offer," or "I accept the offer, John Jones": see *Ogilvie v. Foljambe* (4). And, as a memorandum or instrument may be signed in a variety of forms, so also it can be placed in any position, provided that, on the fair and true reading of the instrument, it authenticates the instrument, and every part of it: *Ogilvie v. Foljambe* (4); *Caton v. Caton* (5).

(1) 2 M. & S. 286.

(3) 3 M. & G. 452.

(2) 1 Ca. 513.

(4) 3 Mer. 62.

(5) L. R. 2 H. L. 127.

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Another element of confusion also arises. Not always, I think, is it sufficiently remembered that the statute does not require the signature to be to the contract itself; it is sufficient if there is a signed note or memorandum of the contract. On this point the following decisions may be noted:—The signature may be contained in a memorandum to a third person: *Leroux v. Brown* (1); or to the party's own agent: *Clerk v. Wright* (2); *Gibson v. Holland* (3). And where an agreement, complete in all its terms, was reduced to writing, and the contents of the writing were known to the defendant, it was held that the signature to it by the defendant signing as a witness was sufficient: *Welford v. Beazely* (4). Any document signed by the party, and containing the terms of the contract, is sufficient: per Bowen L.J. in *Re Hoyle* (5).

What I have said is so well settled as to be elementary; but I do think that a clear grasp of these elementary matters solves any difficulty that may arise. I now come to apply these considerations to the facts of this case. First, I ask myself was there a complete contract? There evidently was, for the contract was complete the moment the auctioneer's hammer fell. Second, is the document a memorandum of it? It obviously is, for it contains all the essentials of the contract. Third, is the memorandum signed? The name of the vendor is in it; it is put there by the vendor's agent with the vendor's authority. It is true that it is not at the end of the document; but that, as I have shown, is not essential. Does it authenticate the memorandum? It obviously does so, for I fail altogether to follow the argument that the signature is not a good signature because it was put to the document before the contract was completed. When the memorandum was filled up and given to the purchaser to sign, it was authenticated by the name of the vendor, then in it, quite as effectively as if it were put in afterwards. It is quite true that a mere formal signature seems to have been intended; but it seems to me, and it has been held (*Gibbons v. N.-E. Metropolitan Asylum District* (6)) that that does not affect the matter. In this connexion reliance was placed upon certain

(1) 12 C. B. 818.

(2) 1 Atk. 12.

(3) L. R. 1 C. P. 1.

(4) 3 Atk. 504.

(5) [1893] 1 Ch., at p. 99.

(6) 11 Beav. 1.

cases in which draft or engrossed agreements containing the names of the parties were held to be not sufficiently signed memoranda to satisfy the statute, even though the name of the party sought to be charged was put in the draft or engrossment by the agent of such party : see *Hubert v. Treherne* (1) ; *Munday v. Asprey* (2). I think these cases are explained by this : that there was no complete agreement at all ; that there was, according to the intention of the parties, a locus poenitentiae, unless and until both parties signed ; in truth, there was a memorandum of an offer, and not a memorandum of a contract. But this case is quite of another sort ; here there was an absolute contract, unenforceable under the statute, no doubt, for want of the proper evidence of it ; the memorandum was of that contract, and, for the reasons I have stated, the memorandum was sufficiently signed.

A second point, of much less substance than the first, is raised by the defendant. He says that the approval of the Judge who had charge of the Chancery proceedings was necessary, that the contract was conditional on such approval being obtained, and that such approval was not obtained before the issue of the writ in this action for specific performance was issued, and that therefore the action was premature, and should be dismissed. My view is that where a contract is made for the sale of land which cannot be carried unless a consent of a third party be obtained or some such condition be performed, the plaintiff is not precluded from bringing his action till the consent be obtained or the condition performed. He can proceed, and he may show at the trial that the consent has been obtained or the condition has been performed, and, if so, he is entitled to his decree. Nor, as at present advised, do I think a Court of Equity will refuse him adequate and appropriate relief should it appear that though the consent has not been obtained or the condition performed, it is because the defendant, who should obtain the consent or get the condition performed, has taken no steps to do so, though he could if he would.

I agree that the decision of Powell J. should be affirmed, with costs.

Solicitors for the appellant, Thomas O'Brien : *Power & Lewis*.

Solicitors for the respondent : *M'Kenzie & Skehan*.

Solicitor for Francis Woods : *T. F. O'Brien*.

R. ST. J. C.

Appeal.
1920.

Nov. 2.

IN RE SANDES' TRUSTS (1).

(1920. No. 207.)

Proceeds of Sale of settled lands in hands of trustees—Dealings by beneficiaries—Necessity for notice to trustees—Priorities—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 22, sub-s. 5.

By the joint operation of the trusts of a marriage settlement and the will and codicil of C. S., certain lands were settled upon trust for C. S. for life, with remainder to his widow M. S. for life, with remainder to his daughter I. S. absolutely, provided she survived her mother. The lands were sold under the provisions of the Irish Land Purchase Acts, and the Public Trustee for Ireland was appointed trustee of the settlement for the purposes of the Settled Land Acts. The net residue of the purchase-money was transferred to the Public Trustee, who invested it in certain securities. I. S. mortgaged her reversionary interest in the funds to an insurance society, and by way of collateral security conveyed a policy of life assurance to the society. Notice of this mortgage was given to the Public Trustee. I. S. subsequently gave a second mortgage of the same funds to H. F., but no notice of this mortgage was given to the Public Trustee. I. S. gave a third mortgage of the funds to the said society, due notice of which was given to the Public Trustee.

Held, by Ronan and O'Connor L.JJ. (affirming the Master of the Rolls), Sir James Campbell C. dissenting, that the insurance society took priority for both their mortgages over H. F., inasmuch as the property mortgaged was personality.

Held also, that the provisions of section 22, sub-s. 5, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), do not extend to strangers to the settlement.

Carew's Estate (16 W. R. 1077) not followed.

APPEAL by Hester FitzGerald from an order of the Master of the Rolls, dated May 15th, 1920. The facts are fully set out in the report of the case at page 216, ante.

Conner K.C., Norwood K.C. (with them Hungerford), for the appellant.

FitzGibbon K.C. and Macrory, for the respondents.

The arguments were substantially similar to those in the Court below.

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

SIR JAMES CAMPBELL C. :—

Appeal.
1920.

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TRUSTS.

I regret to say I do not find myself in a position to agree with the decision of the Master of the Rolls, but, as my colleagues are satisfied that his judgment is correct, my view is of no importance. However, at the same time I think I ought to state my reasons. There is no dispute as to the facts. [His Lordship, having stated the facts, proceeded :—] Miss Hester FitzGerald appears to have given no notice of her mortgage to the Public Trustee; but she did serve notice of it on the insurance society. The Master of the Rolls has held—and I entirely concur with this view of his—that this was not notice upon which she could rely, inasmuch as it specified only the policy of insurance, and was calculated by reason of the introduction of the words “inter alia” to put the insurance company off their guard.

In 1916 Mrs. Ronayne further charged her rights in the settled property to the same insurance company, who gave notice of this mortgage to the Public Trustee, and the question for decision is as to the respective priorities of these two charges—the mortgage to Hester FitzGerald in 1914, and the subsequent mortgage of 1916 in favour of the insurance society. The insurance company contended, and the Master of the Rolls agreed, that by reason of the notice they gave to the Public Trustee they gained priority over Hester FitzGerald.

The question turns on the construction to be put on one sub-section of sect. 22 of the Settled Land Act, 1882. Before I read that sub-section, let me say that, assuming this to be an ordinary chose in action, it appears to be settled law as the result of *Dearle v. Hall* (1) that the equitable doctrine of notice applies, and that the principle *qui prior est tempore potior est jure* does not apply in the event of notice by the second mortgagee if there is no notice by the first. That, I think, may now be taken as settled law, notwithstanding the destructive criticism the case has received at the hands of the late Lord Macnaghten in *Ward v. Duncombe* (2); but I think I am entitled to say that the judgment and observations of Lord Macnaghten do not lend much encouragement to an extension of the principle of *Dearle v. Hall* (1) beyond

(1) 3 Russ 1.

(2) [1893] A. C. 368.

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Campbell C.

what it actually decided, especially as the rule had on the whole "produced at least as much injustice as it has prevented." Be that as it may, for the purpose of my judgment I take the principle of *Dearle v. Hall* (1) to be the settled law of the land.

Turning to sect. 22 of the Settled Land Act, 1882, I confess I am unable to follow the reasoning of the Master of the Rolls in his treatment of that section. His view is that the section had one purpose only. He says: "The object of the section was to preserve the beneficial interests in the lands which had been legally converted into money"; that is, to preserve for the beneficiaries the equivalent of the estate in money; but sub-s. 5 of sect. 22 seems to me to be much wider in its terms. It provides that "capital money arising under this Act while remaining uninvested or unapplied, and securities [that governs this case] on which an investment of any such capital money is made, shall, for all purposes [not for one purpose] of disposition, transmission, and devolution be considered as land"; and then follow these very important words: "And the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." These concluding words are in themselves sufficient to accomplish the purpose referred to by the Master of the Rolls, and the preceding clause, which says, "capital money . . . and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission, and devolution be considered as land," would on that assumption be unnecessary and redundant. It seems to me to follow necessarily from these words that for the purpose of this charge or mortgage of Hester FitzGerald these moneys must be treated as land. This is, I think, admitted by the Master of the Rolls; but apparently he assumes that they are to be so treated only from the point of view of the assignor or mortgagor. I cannot understand that view. One of the purposes of the mortgage was to give a good charge on the funds to Hester FitzGerald. If for that purpose the funds are to be treated as land, then it seems to me that the doctrine of *Dearle v. Hall* (1)

(1) 3 Russ. 1.

has no application, because sect. 22, sub-s. 5, of the Settled Land Act, 1882, makes the funds land for all purposes of disposition.

If this question was void of authority, I should be very slow to dissent from the view of the Master of the Rolls. His experience in law on this kind is much more extensive than mine. He found only one decision on the point. He says that the decision in *Carew's Estate* (1) is a point-blank authority in favour of the contention of Hester FitzGerald; but later on he says: "I am not aware that *Carew's Estate* (1) has received approval in any subsequent judgment." He gives the answer to that objection himself because he admits that "none of these cases, except *Carew's Estate* (1), touches assignments of choses in action, impressed with the character of real estate, when in fact there is no real estate in existence." If it be true that *Carew's Estate* (1) has not received approval in any subsequent judgment, that is explained by the fact mentioned by the Master of the Rolls, viz., that in none of the cases were the facts similar to those in the case before us. I am therefore unable to treat the judgment of Lord Romilly, as the Master of the Rolls does, by saying that it does not impress me. It seems to me that the judgment is in accordance with the words of the section in question here, and that it is impossible to give effect to these words unless we hold that charges of this nature should be treated as land so far as assignor and assignee, mortgagor and mortgagee are concerned. For these reasons I think the judgment of the Master of the Rolls should be reversed.

RONAN L.J. :—

I am of opinion that the decision of the Master of the Rolls should be affirmed. As FitzGibbon L.J. said in *In re Thomson's Estate* (2), at p. 314: "This case affords one more instance of the difficulty of working out an enactment that a thing shall be deemed to be what it is not"—a statutory fiction. A series of decisions, beginning with *Gover's Case* (3), in 1875, and continuing down to *de Vescei v. O'Connell* (4), have established in such cases what Lord Loreburn during the argument in the latter case called

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In re
SAMUEL
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Sir James
Campbell C.

(1) 16 W. R. 1077.

(2) [1907] 1 I. R. 311.

(3) 1 Ch. D. 182.

(4) [1908] A. C. 298.

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1920.

In re
SANDES'
TRUSTS.

Ronan L.J.

"a canon"; and Lord Atkinson, in his judgment, at p. 314, called "the rule of construction laid down in *Ex parte Walton* (1), and approved and adopted in *Hill v. East and West India Docks* (2)." These cases have often been referred to in this Court. There is a convenient summary of them in the judgment in *Attorney-General v. Corporation of Dublin* (3), at p. 436. I need not repeat it here. It is enough to state the rule in *Ex parte Walton* (4): "The Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to"; and, to cite the final words of Lord Loreburn's judgment in *de Vesci v. O'Connell* (5), "I think the words in question are to be construed to affect the purpose of this Act, and not to affect parties whom it was not the purpose of the Act to touch."

The purposes of the Settled Land Act were—1, to make settled land saleable, and, 2, to transfer the rights of the parties entitled under the settlement to the purchase-money. I adopt what is said by the Master of the Rolls as to this at pp. 223-24 ante, of his judgment; but, having regard to the cases I have referred to, I would wish to add a few remarks. The only difficulty arises from the words "for all purposes of disposition, transmission, and devolution." Disposition by whom? Transmission by whom? Devolution from whom? They are all on the same footing. Take a sample case. Lands settled on A, tenant for life, remainder to B in fee; S, a stranger, buys from B his interest in the securities representing the land; S dies. Can it be contended that his interest in the stock will pass to his heir-at-law or to the devisee of his real estate? Or, further, that if S sells to X, the same thing will happen in the case of X, and so ad infinitum.

Surely the limit of the application of the fiction is clear. It is to apply to the persons claiming under the terms of the settlement, not to the outsiders to whom they have assigned their interests in the securities. These outsiders are plainly, in the words of Lord Loreburn, "parties whom it was not the purpose of the Act to touch."

(1) 17 Ch. D., at p. 756.

(2) 9 App. Cas. 456.

(3) [1917] 1 I. R. 401, 423.

(4) 17 Ch. D. 746, at p. 756.

(5) [1908] A. C. at p. 315.

The two mortgagees are plainly pro tanto purchasers from and assignees of the parties claiming under the settlement. The fiction plainly cannot be extended to determine their rights inter se. That was not the purpose of the Act, and they are not "persons between whom the statutory fiction is to be resorted to."

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Once the interest in the securities has passed from a party entitled under the settlement to an outsider, the fiction ceases to apply to it. The fiction never applied to him. The fiction regulates the power of disposition of the person entitled under the settlement; but, once a valid assignment is made, the fiction ceases to apply to the property comprised in it. That property is no longer to be deemed what it is not. Otherwise what I have pointed out in the case of S and X would be the result.

The duty of giving notice to the trustee is a duty imposed by equity on the assignee as such if he wishes to preserve his priority. It is not a duty as between him and the assignor; it arises after the assignment is complete, and is for the prevention of fraud on all other purchasers of the interest of the assignor. Can it be contended that the fiction is to be extended so as to relieve the assignee from this duty? I may add that the decision in *Ackroyd v. Smithson* (1), that a direction to sell for payment of debts and legacies does not operate as a conversion as between heir-at-law and next-of-kin really rests on the same principle as the rule as to the statutory fictions. I agree with the views of the Master of the Rolls as to *Carew's Estate* (2). I may say, without any disrespect to Lord Romilly, that his later decisions have not the same weight as those of an earlier date. This was at the very end of his career—I think in 1868. The thirty-ninth section of the private Act in *Carew's Estate* (2) was: "Provided always that the trust stock shall, for the purposes of the devolution, transmission, vesting, disposal, and enjoyment thereof, and as between the several persons and the real and personal representatives of the several persons respectively, from time to time, interested therein, under the trusts thereof, by this Act declared, be deemed in equity of the nature of real estate, and not of the nature of personal estate."

(1) 1 Bro. Ch. 503; 1 White & Tudor, 394.

(2) 16 W. R. 1077.

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TRUSTS.
—
Roman L.J.

The case was decided seven years before *Gover's Case* (1). If the principle of the fiction cases be applied, it is obviously wrong. *Gover's Case* (1) is taken as the first of the statutory fiction cases. Long after I had argued *de Vesci v. O'Connell* (2), I came across the following passage in Lord Mansfield's judgment in *Morris v. Pugh & Harwood* (3), in 1761:—"But fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

O'CONNOR L.J. :—

I agree with Roman L.J. and the Master of the Rolls. The question turns on sect. 22, sub-s. 5, of the Settled Land Act, 1882. Having carefully examined the section, the Master of the Rolls came to the conclusion that, while the rights against the property remained untouched, the machinery for its legal transfer had been changed. He says that a person taking an assignment of an equitable interest in funds in the hands of trustees of a settlement for the purposes of the Settled Land Acts "is bound to complete his title by giving notice to the trustees, at the risk of losing priority over a subsequent assignee, just as if the funds were not impressed with the quality of real estate." In my opinion, this conclusion necessarily follows from the fact that the machinery for the legal transfer of the property has been changed.

Solicitor for the appellant : *G. A. Gould.*

Solicitors for the defendants : *Whitney, Moore, & Keller.*

G. L.

(1) 1 Ch. D. 182. (2) [1908] A. C. 298. (3) 3 Burrowes, 1243.

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1. ADMINISTRATION—Legatee carrying on testator's business—Priorities of Creditors—Indemnity—Creditors of the testator entitled to payment in priority to creditors of the trading carried on after the testator's death.] A legatee to whom a testator had bequeathed his business continued to carry it on with the acquiescence of the executors. After decree for administration the business was conducted by a receiver appointed by the Court, and was subsequently sold by the Court as a going concern. The assets were insufficient to pay all liabilities in full. *Held*, that the legatee had no duty to perform towards the estate, and, therefore, was not entitled to any indemnity, and that the creditors of the testator were entitled to be paid in priority to the creditors whose debts were incurred during the legatee's trading. *In re O'Kelly, Burke, and others v. Whelan and others* - - - M. R. 200

2. ADMINISTRATION—Sale by Executor without the sanction of the Court—Statute of Frauds, s. 4—Memorandum—Signature of party to be charged—Sufficiency.] A testatrix by her will appointed two executors, and, having bequeathed certain pecuniary legacies, devised and bequeathed the residue of her estate to one of the executors absolutely. One of the legacies being unpaid, the legatee brought a suit for the administration of the estate of the testatrix, and a decree for administration was made. All the other legacies and the debts and funeral and testamentary expenses had already been paid. After the decree the executors, without obtaining the sanction of the Court, agreed to sell leaseholds, portion of the estate. The conditions of sale stipulated that the sale was to be subject to the

ADMINISTRATION—continued.
approval of the Court. The executors afterwards refused to complete on the ground that without the sanction of the Court they could not exercise their power of sale. *Held*, that the purchaser was entitled to specific performance of the contract. The solicitor for the vendors of land which had been knocked down at an auction prepared a memorandum of the agreement for sale, in the body of which the names of the vendors appeared, and he wrote at the end of the memorandum, "I confirm above sale on behalf of the vendors," with the intention that the auctioneer should sign that statement. He presented the memorandum to the purchaser for his signature, and the purchaser signed it; the document was not signed by the auctioneer or by the vendors. *Held*, that the document constituted a sufficient compliance with the Statute of Frauds, sect. 4. *Halley v. O'Brien and Woods* . POWELL J. 149 [APP. 330]

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D. mortgaged lands in Ireland by separate instruments to *W.* and *B.*, and subsequently was adjudicated a bankrupt in the English Courts. *W.* and *B.* valued their securities in the bankruptcy proceedings at amounts less than the principal sums covenanted to be paid. The trustee in bankruptcy of *D.* having sold the mortgaged lands as vendor under the Irish Land Purchase Acts, *W.* and *B.* were returned on the final schedule of incumbrances as claimants in respect of their mortgages. *W.* subsequently obtained an order in the bankruptcy proceedings empowering him to withdraw his proof, but no such order was applied for by *B.* Held, by the Court of Appeal (reversing the decision of *Ross J.*), that *W.* and *B.* were not restricted to the amounts of their respective valuations, but were entitled on allocation to payment of the full amount of their claims respectively, with interest at the rate stipulated for in their respective mortgages. *Turketine's Estate* - - - - - App. 23

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DOMICIL—Abandonment—*Acquired domicil—Onus of proof—Evidence.*] *W. M.*, whose domicil of origin was Irish, and who was an officer in the British Army in the year 1859, was sent with his regiment to Grahamstown, Cape Colony, South Africa. In 1861, while at Grahamstown, he was discharged from the army. In 1864 a son was born to him, the mother of whom he married in 1867, and, if he were domiciled in Cape Colony, he would thereby have legitimated his said son. In 1879, his first wife having died, he married secondly, and in 1887 made a joint will with his second wife in form in use in Cape Colony. He continued to reside from 1859 till his death in 1893 in South Africa. Evidence was given that *W. M.* had spoken of his desire to return to Ireland, and of doing so when his financial position had improved. *Held*, by Powell J. on the facts, that *W. M.* had abandoned his Irish domicil, and was in 1864 domiciled in South Africa. The decision of Powell J. affirmed by the Court of Appeal.
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ESTOPPEL—Title—Bona fide mistaken statement—*Finding of chief clerk as to ownership of lands—Mistake subsequently discovered—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*] An erroneous statement in an affidavit, made bona fide but without full knowledge of the facts, does not operate as an estoppel

ESTOPPEL—*continued.*

against the party making it. In an action to administer the real and personal estate of a deceased, a finding of fact in the chief clerk's certificate as to the ownership of lands is not conclusive; it is only conditional on title being shown to the lands, and is not in itself a good root of title. *C.*, tenant for life of the lands of *T.*, married *M.*, and died leaving *M.* her surviving. *M.* subsequently married *F.*, the vendor, remained in possession and receipt of the rents and profits of the lands until his death, and on his death left all his property to the vendor, and appointed her sole executrix. Subject to *C.*'s life estate, the lands in fact belonged to *R.* in fee. He died in 1888, leaving all his property to his widow, *H.* In 1898, *H.*, as creditor of *M.*, brought an action for the administration of *M.*'s estate against *F.* In an affidavit filed in an action, *F.* stated erroneously but bona fide that *M.* was in his lifetime seised of the lands of *T.*, and she also accounted in the action for £35, rent received by her thereout. On the said affidavit the chief clerk found that *M.* was seised of the lands, and by an order made on further consideration, *M.*'s real estate was ordered to be sold if the personalty should prove insufficient to pay his debts. The personalty was insufficient, but the lands of *T.* were not sold, as in fact *M.* had no title to them. No further steps were taken in the administration action, and the vendor remained in possession and receipt of the rents and profits. The lands having been sold by her to the tenants under the Land Purchase Acts, *held*, that the vendor was not estopped by the administration proceedings in 1898, that she had acquired as against *H.* a title to the lands under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, and that consequently she was entitled to the residue of the purchase-money.
Mountcashell's Estate - - - Ross J. 1

ESTOPPEL - - - 159
See VENDOR AND PURCHASER—CONDITIONS OF SALE.

EVIDENCE—Abandonment of domicil 57, 74
See DOMICIL.

— Instructions for will—Testator's knowledge of family relations - - - 78
See WILL—AMBIGUITY.

EXECUTOR—Sale by, without sanction of Court - - - 99
See ADMINISTRATION. 2.

“EXECUTORS AND ADMINISTRATORS” - - - 8
See WILL—DEATH COUPLED WITH CONTINGENCY.

EXONERATION of undisposed of personalty [122
See WILL—SPECIFIC LEGACY.

- FINE**—Conveyance in consideration of rent and
fine—Costs - - - 93
See SOLICITOR—BILL OF COSTS. 1.
- Sale by way of sub-fee-farm grant or lease
in consideration of - - - 47
See WILL—TRUST FOR SALE.
- FINES**—Arrears of interest on, payable upon
renewal of lease for lives - - - 257
See RENEWABLE LEASE.
- FOOD SUPPLY—MAINTENANCE OF—**
Right of Crown to take possession of land
without compensation—Defence of the Realm
Act (5 Geo. 5, c. 8)—Regulation 2 L. Lands were
compulsorily acquired by the defendants for the
maintenance of food supply under Regulation 2 L
of the Defence of the Realm Act (5 Geo. 5, c. 8),
which lands were at the time sublet in conacre.
In an action brought by the owners of the lands
for a declaration that they were entitled to com-
pensation from the defendants, and for an order
for the assessment and payment of such compen-
sation: *Held*, that the plaintiffs were entitled to
compensation, and to an inquiry in chambers to
assess such compensation. *Rooney v. Department*
of Agriculture - - - POWELL J. 176
- GRAFT**—Lease taken by one next-of-kin 99
See TRUST.
- New lease obtained by tenant for life 170
See WILL—CONSTRUCTIVE TRUST.
- GUARDIAN**—Appointment of—Sale of infant
tenant in common's lands — Judicial
leases - - - 52
See PRACTICE—LAND COMMISSION.
- IMPROVEMENTS**—Recoupment of Congested
Districts Board for money spent on, in
money not stock - - - 266
See LAND PURCHASE ACTS—ADVANCE.
- INDEMNITY**—Legatee carrying on testator's
business - - - 200
See ADMINISTRATION. 1.
- INFANT**—Tenant in common—Appointment of
guardian - - - 52
See PRACTICE—LAND COMMISSION.
- INFANT NEXT-OF-KIN**—Bailiff for, Proof
of change in character of possession 243
See LIMITATIONS, STATUTE OF—TRUSTS.
- INJUNCTION** — Libel — Jurisdiction — *Judi-*
cature Act (Ireland), 1877, sect. 28, sub-s. 8—
Practice—Service out of jurisdiction—Rules of the
Supreme Court (Ireland), 1905, Order XI, r. 1,
sub-s. (g), r. 2.] The plaintiff claimed an in-
junction to restrain the defendant company from
publishing or exhibiting in Ireland advertise-
INJUNCTION—*continued.*
ments, placards, books, or circulars containing
pictures alleged to be caricatures of the plaintiff,
and to be calculated to expose him to ridicule or
contempt. The Court made an order giving liberty
to the plaintiff to issue the writ, and to serve the
same out of the jurisdiction in London. On a
motion by the defendant company to have the
order discharged:—*Held*, that the Court had
jurisdiction to hear and determine the action, and
that the order for service out of the jurisdiction
was, in the circumstances of the case, rightly
made. *Dunlop v. Dunlop Rubber Co., Limited*,
[280
[Affirmed by C. A. and H. L.]
- INSTRUCTION FOR WILL**—Testator's
knowledge of family relations - 78
See WILL—AMBIGUITY.
- INTEREST** on renewal fines, arrears; only six
years allowed - - - 257
See RENEWABLE LEASE.
- INTERNAL MANAGEMENT**—Transfer of
controlling interest in company not 107
See COMPANY—SHARES.
- 1. INTESTATES' ESTATES ACT, 1890—**
Valuation under—53 & 54 Vict. c. 29, ss. 2, 3, 5,
6—Charge on real and personal estates in proportion
to their values.] Under section 2 of the Intestates'
Estates Act, 1890 (53 & 54 Vict. c. 29), the widow
of an intestate leaving no issue is entitled to a
charge of £500 upon his real and personal estates,
to be borne in proportion to the values of the real
and personal estates ascertained as in the Act pro-
vided. *Held*, that the proportion of the £500
charged on the real estate is raisable as a charge,
and that the widow is not entitled under the Act
to any portion of the real estate in specie.
Cunningham v. Cunningham POWELL J. 119
- 2. INTESTATES' ESTATES ACT, 1890—**
Valuation under—53 & 54 Vict. c. 29,
ss. 2, 3, 5, 6—Registered freehold land—Charge on
real and personal estates in proportion to their
values.] Under sects. 1 and 2 of the Intestates'
Estates Act, 1890 (53 & 54 Vict. c. 29), the widow
of an intestate leaving no issue is entitled, where
the net value of the real and personal estate
exceeds £500, to £500 "part thereof" absolutely,
and to a charge of £500 upon the whole of his
real and personal estates, to be borne in proportion
to the values of the real and personal estates
ascertained as in the Act provided. *Held*, that the
Act gives to the widow merely a charge on the
realty in respect of the proportion of the £500 to
be borne by such estate, and that she is not
entitled to any portion of the real estate in specie.
Dunican, deceased; Dunican v. Dunican
[APP. 212

1. JOINT TENANCY—Severance.] An agreement for sale entered into by the persons who were together joint tenants of real property does not in itself, and in the absence of evidence of intention, operate as a severance of a joint tenancy in the purchase-money. Decision of Wylie J. reversed. *Huyes' Estate* 103, 207

2. JOINT TENANCY—Severance.] An agreement between *E.* and *S.*, joint tenants in fee of land, that *E.* should stand possessed thereof for the term of ten years, she paying thereout to *S.* an annuity, and also a yearly payment to *G. H. B.* and all outgoing. *Held*, to effect a severance of the joint tenancy. *Cowper v. Fletcher* (6 B. & S. 469, 472; 13 W. R. Q. B. 740) discussed. *In re Armstrong* - - - - - 239

JUDICIAL LEASE—Appointment of guardian of infant lessor - - - 52
See PRACTICE—LAND COMMISSION.

LAND PURCHASE ACTS—ADVANCE—
Congested Districts Board—Expenditure on improvements—*Sale to tenants at enhanced price—Recoupment in money or in Land Stock—Irish Land Act, 1903* (3 Edw. 7, c. 37), *sect. 72, sub-s. 3—Irish Land Act, 1909* (9 Edw. 7, c. 42), *sect. 3.] Sect. 72, sub-s. 3, of the Irish Land Act, 1903, provides that when the Congested Districts Board have expended money on the improvement of an estate, and in consequence have sold parcels of that estate at an enhanced price to tenants or others, the National Debt Commissioners may advance to the Land Commission for repayment to the Congested Districts Board such sums as represent the increase of price consequent on the improvements. Held, that the Congested Districts Board are entitled to receive such advances in money, and not in land stock, notwithstanding anything contained in sect. 3 of the Land Act, 1909, which provides that advances for the purpose of the Land Purchase Acts may be made in whole or in part by means of stock. Congested Districts Board v. Attorney-General - 266*

LAND PURCHASE — DEVOLUTION —
Repurchase of untenanted land by tenant for life—*Irish Land Act, 1903* (3 Edw. 7, c. 37), *sect. 3, sub-s. 4.]* An owner in fee of an estate entered into agreements for sale to the tenants under the Land Purchase Acts of the tenanted portion, and also applied that the Land Commission might purchase the portion in his own occupation for the purpose of resale to him. Shortly afterwards he died, having, by his will, left the lands in his own occupation to "*A.*" for life, with remainder over to "*B.*" By order of the Land Commission, proceedings in respect of these lands were directed to be continued in the name of the

LAND PURCHASE—continued.

tenant for life; they were repurchased in her name, and vested in her as owner in fee-simple. Wylie J. having decided that the remainderman was not entitled to an order under sect. 3, sub-s. 4, of the Irish Land Act, 1903 (3 Edw. 7, c. 37), declaring that the tenant for life held the lands in accordance with the terms of the settlement made by the will: on appeal, the Court being of opinion that Wylie J. had overlooked the underlying principle of the section, and concluding that he had gone wrong in point of law, and had exercised his discretion without due regard to definite and fixed principles: *held*, that an appeal lay, and (reversing Wylie J.) that the remainderman was entitled to the order sought. *Bennett's Estate.* APP. 34

LANDLORD AND TENANT—LEASE for three lives and ninety-nine years, whichever shall continue longest—Covenant by landlord to nominate new life on death of every cestui que vie before expiration of term of ninety-nine years—Non-renewal—Death of tenant intestate—Tenancy for term of years—Estate pur autre vie.] By indenture made in 1832, lands were granted to *M.*, his heirs and assigns, for the lives of three persons, or for the term of ninety-nine years, whichever shall continue longest, with a covenant by the landlord that on the death of each cestui que vie dying during the term the landlord would nominate another life in place of that of the cestui que vie so dying. The cestuis que vie named in the lease died in 1863, 1864, and 1893 respectively; no new life was ever nominated. The tenant died intestate in 1918. *Held*, that there was an equitable freehold in the lands comprised in the lease. *M'Donnell v. Stenson.* POWELL J. 85

[Affirmed by C. A.]

LANDLORD AND TENANT—Agreement—
Letting or sale—Preparation of deed.] *A* in consideration of a sum of £375, and the yearly rent of £3 10s. to be paid to *A* by *B*, agreed to grant to *B* a sub-lease of premises for 9000 years, the "sale" to be completed and possession given, and rent to commence on the 1st June following the date of the agreement. *Held*, that the agreement was one for a sub-lease, and that the lessor's solicitor was entitled to prepare it. *M'Cord v. Ramsey* - - - - - POWELL J. 264

LEASE FOR LIVES—Limited covenant by landlord for renewal—Non-renewal—Equitable freehold - - - 85
See LANDLORD AND TENANT—LEASE.

LEASE—New lease to tenant for life—Graft
See WILL—CONSTRUCTIVE TRUST. [170

LEASING POWER—Sale by way of sub-fee-farm grant or lease - - - 47
See WILL—TRUST FOR SALE.

LEGATEE carrying on testator's business—Priorities of creditors - 200
See ADMINISTRATION. 1.

LETTING OR SALE—Preparation of deed
See LANDLORD AND TENANT. [264]

LIBEL—Injunction to restrain - - 280
See INJUNCTION.

LIMITATIONS, STATUTE OF—Title under, not forced on purchaser - - 159
See VENDOR AND PURCHASER—CONDITIONS OF SALE.

1. LIMITATIONS, STATUTE OF—REALTY
—Mortgagee in possession—Sale—Statement in schedule to originating application—Acknowledgment—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), sect. 7.] On a sale of land under the Land Purchase Acts by mortgagees in possession (who had been in possession for upwards of twenty-five years), the mortgagor (an undischarged bankrupt) was returned on the schedule to the originating application as owner of the equity of redemption. *Held*, that the originating application did not operate in favour of the official assignee, either by way of acknowledgment or estoppel, and that the mortgagees were entitled as absolute owners. *Huddleston's Estate*

Ross J. 29

2. LIMITATIONS, STATUTE OF—REALTY
—Annuity charged on land—Arrears—Real Property Limitation Act, 1833 (3 & 4 Wm. 4, c. 27), s. 42—Irish Land Act, 1903 (3 Ed. 7, c. 37)—Sale by tenant for life—Trustees for the purposes of the Settled Land Acts.] By indenture of settlement, dated 15th May, 1880, lands were conveyed, subject to certain rent-charges and incumbrances then existing thereon, to trustees to the use, inter alia, that R. H. E. and E. M. E. should receive annual rent-charges of £75 each, which were thereby charged on the said lands, and a term of 500 years was limited to the trustees to secure the said annuities. Subject to the said annuities, the lands were limited to the use of R. E. for life, with remainder to his first and other sons in tail. L. E. was entitled in priority to the settlement to two annual rent-charges of £300 and £200 respectively. From May, 1903, the income of the lands was insufficient to pay the said prior rent-charges in full. In 1905 R. E. agreed to sell portion of the lands to the tenants thereof under the Irish Land Act, 1903. On 20th March, 1911, the purchase-money was lodged in the Bank of Ireland, and an order made attaching claims thereto. In the schedule of incumbrances lodged in the matter of the said sale, R. H. E. and E. M. E. appeared as claimants in respect of the arrears of their annuities, and on 25th August,

LIMITATIONS, STATUTE OF—continued.

1905, were each paid on account a portion of the sum due for such arrears. The residue of the purchase-money was vouched payable to the trustees as trustees for the purposes of the Settled Land Acts, and was retained in Court to meet the rent-charges payable to L. E. L. E. died in 1919, and the investments representing the residue of the purchase-money were transferred to the trustees. On summons by the trustees to determine the amount payable in respect of the arrears of the annuities, the sales having been carried out under the Settled Land Act, 1882, and the purchase-money being capital money under that Act, and to be treated as land:—*Held*, that only six years' arrears of the annuities were recoverable against the trust estate. *Ryott v. Bentley*

[321]

LIMITATIONS, STATUTE OF—REALTY.

See ESTOPPEL.

[1]

LIMITATIONS, STATUTE OF—TRUSTS

—Bailiff for infant—Change in character of possession—Evidence.] S. B., the owner of lands held by him as a yearly tenant, died in 1876 intestate as to those lands, leaving a widow and seven children, among whom were the plaintiff R. B., born in 1869, M. B., born in 1862, and P. B., born in 1864. At the date of the death of S. B., his widow and children were living on the lands. After the death of S. B. his widow farmed the lands, and continued to live on the farm until her death in 1918. In 1913 she had assigned all her interest in the lands to P. B. The plaintiff continued to live on the lands till 1898, when she married, and went to live elsewhere. M. B. continued to live on the lands until 1901, when he married and went to live elsewhere; from 1878 to 1901 he assisted the widow in farming the lands; in 1911 he assigned his interest in the lands to P. B. P. B. continued to live on the lands until the present proceedings; for some years after 1880 he assisted the widow to farm the lands, and subsequently farmed the lands himself. Until after the death of the widow, the plaintiff was not aware that she was entitled to any share of the lands under her father's intestacy. The plaintiff claimed administration of the estate of S. B., and that P. B. be declared a trustee for her of her share of the lands: *Held*, that the widow and P. B. respectively entered into possession of the lands as to the plaintiff's distributive share thereof as bailiffs for the plaintiff, that their position as such was not changed by the plaintiff's marriage and departure from the lands without making any claim to her share, and that her right was not barred by the Statute of Limitations. The onus is upon the person alleging change in the character of the possession

LIMITATIONS, STATUTE OF—*continued.*

relied upon. *In re Maguire and M'Clelland's Contract* ([1907] 1 I. R. 393) distinguished.
Rice v. Begley - - - POWELL J. 243

LUNACY—Transferring to Chancery Division on death of lunatic - - - 124
 * See PRACTICE—ORDER DISMISSING OUT OF LUNACY.

MISDESCRIPTION—Specific bequest 232
 See WILL—SPECIFIC BEQUEST.

— Will—Ambiguity. 78
 See WILL—AMBIGUITY.

MORTGAGE—Bankruptcy valuation of security—Land purchase—Allocation interest - - - - - 23
 See BANKRUPTCY—PROOF.

MORTGAGE of proceeds of sale of lands—Money in hands of Settled Land Act trustee—Necessity for notice - 216
 See PRIORITIES.

NOTICE—Proceeds of sale of lands in hands of Settled Land Act trustees—Necessity for - - - - - 216
 See PRIORITIES.

PICTURES alleged to be caricatures—Action to restrain publication of - - - 280
 See INJUNCTION.

POSSESSORY TITLE not forced on purchaser [159]
 See VENDOR AND PURCHASER.

POWER OF APPOINTMENT—Exercise—Remoteness - - - - 137
 See WILL—APPOINTMENT.

POWER OF APPOINTMENT — Special power — Condition.] Although a condition fettering an appointment to an object of a special power is in general invalid, it may be valid if it operates in favour of another object of the power. *In re Witty* ([1913] 2 Ch. 666) applied. *In re Leahy, Leahy v. Payne* - Ross J. 260

POWER OF SALE, leave to exercise - 32
 See SETTLED LAND ACTS.

PRACTICE — ABATEMENT — Death of parties—*Further inquiry without revivor.*] In a suit brought by one trustee against the other trustee and beneficiaries to be relieved from his trust, the fund was ordered to be brought into Court, and the dividends paid to a person who under the trust was entitled to the fund for her life. After her death, the plaintiff and several of

PRACTICE—*continued.*

the defendants being then dead, three of the surviving defendants applied for an inquiry as to the persons entitled to the fund. It was referred to Chambers to ascertain who were entitled to the fund without any order to continue proceedings. *Ferguson v. Ferguson and Others* POWELL J. 81

PRACTICE—**APPEAL**—Costs of abortive appeal—*Final or interlocutory.*] A notice of appeal in an interlocutory matter was served upon the intended respondent, whose solicitors thereupon prepared briefs for the appeal, and handed same to counsel. The appeal was in fact taken late, and the Registrar accordingly refused to set it down, but this fact was not intimated to the intended respondent. On an application to the Court of Appeal: *Held*, that he was entitled to all costs necessarily and properly incurred by him under the notice of appeal served upon him. *Gilson v. Bennett* - - - - APP. 75

PRACTICE — **LAND COMMISSION**—Appointment of guardian—*Infant tenant in common—Leases granted at fines—Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), s. 61; Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), s. 38.*] E. and her infant daughter D. were owpers as tenants in common of certain lands. These lands were put up for sale by auction in eight lots, under conditions providing that the owners should grant the purchasers judicial leases for 300 years at specified rents, the purchasers paying fines to be fixed by competition at the auction. On an application to the Land Commission by the owners to appoint H. G. guardian of the infant: *Held*, that, under sect. 38 of the Land Law (Ireland) Act, 1881 (44 & 45 Vict. c. 49), incorporating sect. 61 of the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46), the Land Commission had jurisdiction to appoint a guardian to carry out the transaction on the infant's behalf; but that, inasmuch as the transaction in substance was the sale of an estate of which the infant was entitled to an undivided half, the proper course was to make the infant a ward of Court, and then to apply to the Lord Chancellor (or other Judge before whom the minor matter should come) to approve or not of the application to the Land Commission to sanction judicial leases; and that, on the infant's being made such ward of Court, the amount of the fines, so far as they belonged to her, should be lodged in Court to the credit of the minor matter to be dealt with by the Judge before whom such minor matter should come; but that the Land Commission had no jurisdiction to order the fines to be lodged in Court or otherwise to deal with them. *In re Sproule's Estate* - - - - LAND COM. 52

PRACTICE—ORDER DISMISSING OUT OF LUNACY and transferring to Chancery Division—*Subsequent procedure.*] Procedure where, on the death of a lunatic, an order has been made under the Lunacy Regulation (Ireland) Act, 1871 (34 Vict. c. 22), s. 55, terminating the matter in, and dismissing it out of, lunacy, and transferring it to the Chancery Division, *Corkery v. Egan*.

[M. R. 154]

PRACTICE—PATENT—Petition for extension—*Term of patent extended by statute passed after presentation of petition*—*Patents and Designs Act, 1907* (7 Edw. 7, c. 29), ss. 17, 18—*Patent and Designs Act, 1919* (9 & 10 Geo. 5, c. 80), s. 6.] Where the term of a patent has been extended by an Act of Parliament passed subsequent to the presentation by the patentee of a petition under sect. 18 of the Patents and Designs Act, 1907, the petition must be adjourned generally. *In re Macintosh's Patent* (Webster's Patent Cases, 739) followed. *In re Allibon's Patent*.

[Ross J. (for M. R.) 83]

PRACTICE—Service out of Jurisdiction—Writ for injunction to restrain libel - 280
See INJUNCTION.

PRIORITIES—Proceeds of Sale of settled lands in hands of trustees—*Dealings by beneficiaries*—*Necessity for notice to trustees*—*Priorities*—*Settled Land Act, 1882* (45 & 46 Vict. c. 38), s. 22, sub-s. 5.] By the joint operation of the trusts of a marriage settlement and the will and codicil of C. S., certain lands were settled upon trust for C. S. for life, with remainder to his widow M. S. for life, with remainder to his daughter I. S. absolutely, provided she survived her mother. The lands were sold under the provisions of the Irish Land Purchase Acts, and the Public Trustee for Ireland was appointed trustee of the settlement for the purposes of the Settled Land Acts. The net residue of the purchase-money was transferred to the Public Trustee, who invested it in certain securities. I. S. mortgaged her reversionary interest in the funds to an insurance society, and by way of collateral security conveyed a policy of life assurance to the society. Notice of this mortgage was given to the Public Trustee. I. S. subsequently gave a second mortgage of the same funds to H. F., but no notice of this mortgage was given to the Public Trustee. I. S. gave a third mortgage of the funds to the said society, due notice of which was given to the Public Trustee. *Held*, by Ronan and O'Connor L.JJ. (affirming the Master of the Rolls), Sir James Campbell C. dissenting, that the insurance society took priority for both their mortgages over H. F., inasmuch as the property mortgaged was personalty. *Held* also, that the provisions of

PRIORITIES—*continued.*

section 22, sub-s. 5, of the Settled Land Act, 1882 (44 & 45 Vict. c. 38), do not extend to strangers to the settlement. *Carew's Estate* (16 W.R. 1077) not followed. *In re Sandes' Trusts* - - - M.R. 216, App. 342

PROBATE—COSTS of extracting grant—with-
drawal of solicitor's retainer - 228
See SOLICITOR—BILL OF COSTS. 2.

REMOTENESS—Appointment by will - 137
See WILL—APPOINTMENT.

RENEWAL of lease for lives—Limited covenant
by landlord—Non-renewal—Equitable
freehold - - - - 85
See LANDLORD AND TENANT—LEASE.

RENEWABLE LEASE—Interest on fines
—*Lease for lives*—*Lives dropped*—*Equitable right to renewal*—*Tenantry Act* (19 & 20 Geo. 3, c. 30, Ir.).] No renewal had been taken out for close on a hundred years in respect of a renewable lease, the last life in which had dropped thirty-two years ago. In view of the provision of the Tenantry Act (19 & 20 Geo. 3, c. 30, Ir.) empowering "adequate compensation" to be awarded to a lessor in such a case, the Court, in the exercise of its judicial discretion, refused to allow the total arrears of interest on renewal fines, and allowed only six years' arrears in respect of each renewal fine. *McDermott's Estate* - - - Ross J. 257
[Reversed by C. A.]

RULES AND ORDERS—R. S. C., 1899—
Bankruptcy, r. 91 - - - 23
See BANKRUPTCY—PROOF.

— R. S. C., 1905—Order 11, r. 1,
sub-s. (g), r. 2 - - - 280
See INJUNCTION.

— R. S. C., 1905—Order 65, r. 90,
App. S., Part iii. - - - 228
See SOLICITOR—BILL OF COSTS. 2.

SALE by way of sublease and fine—Preparation
of deed - - - - 264
See LANDLORD AND TENANT.

SERVICE OUT OF THE JURISDICTION
—Writ to restrain libel - - 280
See INJUNCTION.

SETTLED LAND ACT, 1882—Proceeds of
sale of lands under - - 216, 342
See PRIORITIES.

SETTLED LAND ACTS—*Sale to tenants*—*Person "deemed to be tenant for life"*—*Trust for sale*—*Costs*—*Land Act, 1903* (3 Edw. 7, c. 37),
sect. 48—*Land Act, 1904* (4 Edw. 7, c. 34), sect. 3
—*Settled Land Act, 1882* (45 & 46 Vict. c. 38),

SETTLED LAND ACTS—continued.

sect. 63—*Settled Land Act*, 1884 (47 & 48 Vict. c. 18), sect. 7.] Where the person deemed to be tenant for life of land devised to trustees upon trust for sale has entered into agreements for the sale of the land under the provisions of the Irish Land Acts, 1903-4, the Court, if satisfied that he is acting honestly and for the advantage of all persons interested, will give him leave to exercise his power of sale under the Settled Land Acts, although the effect will be that he will capture the bonus. The applicant was directed to bear his own costs, and the costs of the trustees were directed to be paid out of the trust fund. *In re Iever's Settlement* ([1904] 1 I. R. 492); *In re Settled Land Acts and Tuthill* ([1907] 1 I. R. 305); *Finch v. Jones* ([1912] 1 I. R. 338), followed. *In re Settled Land Acts and O'bré* - M. R. 32

SEVERANCE of joint tenancy—Agreement for sale by all joint tenants not *per se* a 207
See **JOINT TENANCY**. 1.

— of joint tenancy - - - - 239
See **JOINT TENANCY**. 2.

1. SOLICITOR—BILL OF COSTS—Conveyance in consideration of rent and fine—Costs of deducting grantor's title—Scale fee—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44)—*General Order*, 1884, *Schedule I, Part II, rule 5.*] Solicitors acting for a lessor having prepared a lease in perpetuity at a rent of £200 per annum, and in consideration of a fine of £2900, and having also supplied abstract of the lessor's title and documents to vouch, furnished to the lessee a bill of costs claiming the scale fees as calculated by Schedule I, Part II, and rule 5, and, in addition, the costs of preparing Abstract of Title and copies of documents to vouch same under Schedule II, General Orders, 1884. *Held* (affirming the decision of the Taxing Master), that the remuneration provided by rule 5 for the case of a lease in consideration of a fine only covers the charge "for preparing, settling, and completing conveyance and duplicate or lease and counterpart," and that the reference in the rule to Part I of the schedule (which deals with costs in the case of sales) is only for the purpose of ascertaining the amount of the remuneration by reference to the amount of the fine. *In re Robson* (45 Ch. D. 71) and *Ex parte Connolly* ([1900] 1 I. R. 1) considered and applied. *In re Macredy and The Solicitors' Remuneration Act*, 1881 M. R. 93

2. SOLICITOR—BILL OF COSTS—Withdrawal of retainer of solicitor—Costs in probate matters—R. S. C. 1905, Order 65, r. 90, App. S, Part III, sect. 1.] A solicitor, on the instructions of a client, incurred costs, and took all the necessary

SOLICITOR—continued.

steps to obtain probate. Before the grant was extracted the client withdrew his retainer, the grant being subsequently extracted by another solicitor. *Held*, that the solicitor first employed should, on taxation, be allowed his charges for all actual work done, but that the fees for probate under seal and extracting should be allowed only to the solicitor who actually extracted the grant. *In re Lane Joynt* - - - - POWELL J. 228

SPECIFIC PERFORMANCE—Sale of leaseholds by executors - - - 149, 330
See **ADMINISTRATION**. 2.

STATUTES—19 & 20 Geo. 3, c. 30, Ir. 257
See **RENEWABLE LEASE**.

— 3 & 4 Wm. 4, c. 27, s. 42 - - - 321
See **LIMITATIONS, STATUTE OF—REALTY**. 2.

— 33 & 34 Vict. c. 46 - - - - 52
See **PRACTICE—LAND COMMISSION**.

— 34 Vict. c. 22, s. 55 (Lunacy Regulation (Ir.) Act, 1871) - - - - 134
See **PRACTICE—ORDER DISMISSING OUT OF LUNACY**.

— 37 & 38 Vict. c. 57, s. 1 - - - 1
See **ESTOPPEL**.

— 37 & 38 Vict. c. 57, s. 7 - - - 29
See **LIMITATIONS, STATUTE OF—REALTY**. 1.

— 40 & 41 Vict. c. 57, s. 28 - - - 280
See **INJUNCTION**.

— 44 & 45 Vict. c. 38, s. 22 - - - 216, 342
See **PRIORITIES**.

— 44 & 45 Vict. c. 44 (Solicitors' Remuneration Act, 1881) - - - - 93
See **SOLICITOR—BILL OF COSTS**. 1.

— 44 & 45 Vict. c. 49, s. 38 - - - 52
See **PRACTICE—LAND COMMISSION**.

— 45 & 46 Vict. c. 38, s. 22, sub-s. 5 216, 342
See **PRIORITIES**.

— 45 & 46 Vict. c. 38, s. 63 - - - 32
See **SETTLED LAND ACTS**.

— 47 & 48 Vict. c. 18, s. 7 - - - 32
See **SETTLED LAND ACTS**.

— 53 & 54 Vict. c. 29, ss. 2, 3, 5, 6 119, 212
See **INTERSTATES' ESTATES ACT, 1890**. 1, 2.

— 56 & 57 Vict. c. 53, s. 13 - - - 47
See **WILL—TRUST FOR SALE**.

— 3 Ed. 7, c. 37 - - - - 321
See **LIMITATIONS, STATUTE OF—REALTY**. 2.

— 3 Edw. 7, c. 37, s. 3 - - - 34
See **LAND PURCHASE—DEVOLUTION**.

STATUTES—continued.

— 3 Ed. 7, c. 37, s. 48	- - -	32
<i>See SETTLED LAND ACTS.</i>		
— 3 Ed. 7, c. 37, s. 72, sub-s. 3	- - -	266
<i>See LAND PURCHASE ACTS—ADVANCE.</i>		
— 9 Ed. 7, c. 42, s. 3	- - -	266
<i>See LAND PURCHASE ACTS—ADVANCE.</i>		
— 7 Ed. 7, c. 29, ss. 17, 18	- - -	83
<i>See PRACTICE—PATENT.</i>		
— 5 Geo. 5, c. 8	- - -	176
<i>See FOOD SUPPLY, MAINTENANCE OF.</i>		
— 9 & 10 Geo. 5, c. 80, s. 6	- - -	83
<i>See PRACTICE—PATENT.</i>		

STATUTE OF FRAUDS—Memorandum—

Sufficiency	- - -	149, 330
<i>See ADMINISTRATION. 2.</i>		

SUB-FEE-FARM GRANT—Sale by way of, in consideration of fine

47

*See WILL—TRUST FOR SALE.***TENANT FOR LIFE—Leave to sell**

32

*See SETTLED LAND ACTS.***— Repurchase of untenanted lands by**

34

*See LAND PURCHASE—DEVOLUTION.***TENANTRY ACT (19 & 20 Geo. 3, c. 30, Ir.)—**

Arrears of interest upon fines for renewal of lease	- - -	257
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See RENEWABLE LEASE.

TRUST—Graft—*Yearly tenancy—Lease taken by 'one next-of-kin.'* *C. M.* the elder, a tenant from year to year of lands situate in County Meath, died intestate in the year 1864. His widow and children remained living on the lands as tenants in common, no administration having been taken out. On the 10th November, 1873, a lease of the lands was made to John, the eldest surviving son, and he subsequently signed a purchase agreement under the Land Purchase Acts. In October, 1905, the lands were vested in him as owner, subject to equities. By a deed dated February 11th, 1905, John assigned the farm to his brother Charles the younger, and died intestate. In the year 1911 *C. M.* the younger devised the lands to the defendant. His sisters *E.* and *C.* continued to reside on the farm, and in a suit to administer the estate of *C. M.* the younger, they claimed to be entitled to an undivided two-thirds of the lands. *Held*, that John took the lease as trustee for the family, and that it was a graft on the previously existing interest. *Kiernan v. Mc'Cann* - - - M. R. 99

UNTENANTED LAND—Repurchase of

34

*See LAND PURCHASE—DEVOLUTION.***VALUATION—Registered freehold land**

119,

[212

*See INTSTATES' ESTATES ACT, 1890.***VALUATION OF SECURITY**

23.

*See BANKRUPTCY—PROOF.***VENDOR AND PURCHASER—CONDI-****TIONS OF SALE—Possessory title not**

forced on purchaser—Estoppel. Premises held under a lease of 1800 for 999 years, containing covenants against alienation, or user as licensed premises without the landlord's consent, and reserving a rent of £8 reducible to £4 so long as the covenants in the lease were observed, were put up for auction by the vendor. The particulars stated that the reduced rent of £4 had been accepted for many years, but no mention was made of these restrictive covenants. The conditions of sale provided that the title should commence with an assignment of the lease in 1839, and that the sale was made subject to the covenants in the lease. An abstract showing title from 1839 was delivered, whereby it appeared that the landlord had not assented to any of the assignments therein abstracted. The premises had for many years, without the landlord's consent, been sublet to a publican, and were in fact licensed premises. On the purchaser insisting that the landlord's consent to the assignment and to the user of the premises as a public-house should be obtained, the vendor contended that a good title had been shown according to the conditions of sale. On the vendor and purchaser summons by the vendor, the vendor for the first time claimed to have made a good title under the Statute of Limitations, inasmuch as he and his predecessors had been in possession under assignments which were void under the Landlord and Tenant Act, 1860 (23 & 24 Vict. c. 154), s. 10, and that such a title could be forced on the purchaser. *Held*, that the vendor, having accepted the benefit of the reduced rent of £4, was estopped from denying his liability to the covenants in the lease, and was bound by the covenant against alienation. *Held* further, that the doctrine of *Tichborne v. Weir* (67 L. T. 735) has no application to the right of a lessor to restrain breaches of negative covenants restricting the user of the demised premises, and that the title was not such as could be forced on a purchaser. *Tichborne v. Weir* (67 L. T. 735) discussed. *Ashe v. Hogan* - - - M. R. 159

VENDOR AND PURCHASER—Memoran-**dum—Sufficiency—Administration sale****by executor without the sanction of the****Court**

99

See ADMINISTRATION. 2.

WIDOW not entitled under Intestates' Estates Act, 1890, to any portion of real estate in specie - - - 119, 212
See **INTESTATES' ESTATES ACT, 1890.**

WILL—AMBIGUITY — Misdescription — Instructions for will—Evidence.] A testator by his will devised and bequeathed all his property to a sister, describing her as "Annie Neary." He had in fact four sisters, the defendants Annie Flynn, Bridget Neary, and Mary Walsh, and an unmarried sister Dora, all of whom lived in America. From the contemporaneous written instructions for the will given by the testator to his solicitor it appeared that the testator stated that he had three sisters, whose names he gave as Annie Neary, Beesie (without mentioning her surname), and Mary Walsh. *Held*, by the Court of Appeal (affirming the decision of Powell J.), that the Court was entitled to look at the written instructions for the purpose of ascertaining the testator's knowledge as to his family relations, and that, on the true construction of the will, the sister Annie Flynn was entitled to the property. *In re Cawley, deceased; Robertson v. Flynn and others* - - - **APPEAL 78**

WILL—APPOINTMENT — Remoteness — Special power.] A testator, who died in 1881, devised his lands to *A* for life, and after *A*'s death to any son or sons "as he shall deem most deserving and attaining the age of twenty-five years," and, if *A* should die without male issue, over. *A* had issue three sons, *B*, *C*, and *D*, all born before the testator's death. *A*, who died in 1918, by his last will made in 1918, in exercise of the power of appointment, appointed the lands to his sons *C* and *D*, and to the eldest son of *B*. *Held*, a good appointment to *C* and *D*, and not void for remoteness. *Davy v. Clarke* - - - **POWELL J. 137**

WILL—CONSTRUCTIVE TRUST—Leaseholds—Renewal—Limited owner.] A testator by his will appointed his wife and brother his executors and trustees, and bequeathed to them certain leasehold premises upon trust to permit his wife to use and enjoy the same and the profits thereof during the residue of the term for the benefit of herself if she should so long live and continue his widow; and the will provided that if the widow should die or marry before the expiration of the term the leasehold premises should be sold, and the proceeds held upon trust for the testator's children as therein provided. The widow alone proved the will, and she acted as sole trustee. The lease expired nine years after the testator's death, whereupon the widow, who had remained in beneficial possession of the leaseholds, and had not re-married, remained on as tenant for three years, and she then

WILL—continued.

obtained a new lease of the premises in her own name. *Held* by the Court of Appeal (affirming the decision of Powell J.), that on the true construction of the will the widow was in possession under the former lease as tenant for life only, and that the new lease was a graft upon the old one. *Brady, deceased; Brady v. Brady* - **APP. 170**

WILL—DEATH COUPLED WITH CONTINGENCY—"Die unmarried or without issue"—"Executors and administrators."] A testator directed the annual interest on a sum of £1500 to be paid to his sister *C*. for life, and after her death to be paid to *C*'s daughters *A*. and *A. J.* until marriage, and, "in case both the said nieces should die unmarried or be married without issue," the testator directed the £1500 to be paid to such of *C*'s children as *C*. should appoint, and in default of appointment to the executors and administrators of *C*. *Held*, applying *O'Mahoney v. Burdett* (L. R. 7 H. L. 388), that by the words "die unmarried without issue," the testator meant the dying of his nieces without issue living at the time of death, at whatever time that death should happen. *Held*, further, applying *Attorney-General v. Malkin* (2 Ph. 64), that "executors and administrators of *C*." meant *C*'s personal representatives and not *C*'s next-of-kin. *In re Creagh, deceased; Burton v. Turner* - **POWELL J. 8**

WILL—SPECIFIC LEGACY — Legatees directed to pay debts—Undisposed of personality—Examination—Condition attached to bequest.] A testator gave a farm of land to his son Francis, and, having given pecuniary and other legacies, made this provision: "My son Francis shall also pay all my just debts and demands against my property, death-bed and funeral expenses." There was a residue of undisposed of personality. *Held*, that Francis took the farm on the condition that he paid all the testator's debts and testamentary expenses, that having accepted the bequest, he was bound to fulfil the condition, and that the undisposed of residue was exonerated from liability. *Duffy v. Duffy* - - - **APP. 122**

WILL—SPECIFIC LEGACY—Misdescription—Selection—Uncertainty.] A testator, who owned eight leasehold houses in S. Terrace, numbered 3 to 10, inclusive, by her will directed her executors to sell "the seven houses I hold in S. Terrace," and hold the proceeds upon certain trusts. *Held*, that the eight houses passed under the bequest. *Moore v. Moore and Others*.

[**POWELL J. 232**

WILL — TRUST FOR SALE — *Unlimited power of leasing—Sale by way of sub-fee-farm grant or lease—Trustee Act, 1893, sect. 13.]* A trustee for sale under a will, with an unlimited power of leasing, is entitled to carry out the sale by granting sub-fee-farm grants or sub-leases in consideration of fines and reserving rents exceeding in the aggregate the head-rent. *Alexander v. Clarke* - - - - - M. R. 47

WORDS—“Adequate compensation” payable to lessor under Tenantry Act, 19 & 20 Geo. 3, c. 30, Ir., s. 1. Only six years’ arrears of interest on renewal fines allowed 257
See RENEWABLE LEASE.

WORDS—continued.
—— “Die unmarried or without issue” 8
See WILL—DEATH COUPLED WITH CONTINGENCY.
—— “Executors and administrators of C.” 8
See WILL—DEATH COUPLED WITH CONTINGENCY.

YEARLY TENANCY—Lease taken by one next-of-kin—Graft - - - 99
See TRUST.

THE END.



